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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

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47 CFR Section 0.291; sect. 36.611(a); 36.613(a) 3863

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-158

In re Applications of

LESLIE E. GRADICK File No. BPH-900530MG

JOSEPH I. KENDRICK File No. BPH-900531ME

For Construction Permit for a
New FM Station on Channel 271A
in Bolingbroke, Georgia

Appearances

David L. Hill, Esq., and *Audrey P. Rasmussen, Esq.* on behalf of Leslie E. Gradick; and *Lawrence J. Bernard, Jr., Esq.*, on behalf of Joseph I. Kendrick and *Paulette Laden, Esq.*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: June 5, 1992; Released: June 15, 1992

Preliminary Statement

1. The captioned applications of Leslie E. Gradick ("Gradick") and Joseph I. Kendrick ("Kendrick") were designated for hearing in a *Hearing Designation Order* ("*HDO*") DA 91-675, released June 17, 1991 along with two other applications which were subsequently dismissed,[1] on the following issues:

> To determine which of the proposals would on a comparative basis, best serve the public interest, and
>
> To determine, in light of the evidence adduced pursuant to the specified issues, which of the applicants should be granted, if any.

The *HDO* also noted that since there appeared to be significant differences between the sizes of the areas and populations which the applicants proposed to serve, evidence concerning these factors would be considered. A prehearing conference was held on August 22, 1991 and a hearing session was held on January 28, 1992. At the hearing session the written exhibits exchanged by the parties were received without cross-examination of the sponsoring witnesses, after which the record was closed (Tr. 24).

Findings of Fact

Standard Comparative Issue

Leslie E. Gradick

2. Gradick is an individual who has 100% ownership in the application (Gradick Exh. 1, p. 1).

3. Gradick holds no attributable media interest in any AM, FM or TV broadcast station, daily newspaper, cable television system, advertising agency, or other medium of mass communication (Gradick Exh. 1, p. 1).

4. The applicant's spouse, Jean M. Gradick, has been granted a contingent construction permit in an FM proceeding in Coosa, Georgia, MM Docket No. 91-164, on October 30, 1991 (Gradick Exh. 1, p. 1). Leslie Gradick and Jean Gradick have never owned media properties together. However, each of them has separately owned media properties. Further, Jean Gradick used her own financial assets as the basis for the financial certification of her Coosa, Georgia application; and neither was involved in the preparation and prosecution of the other's application. Each has separate attorneys prepare and prosecute the individual applications (Gradick Exh. 1, p. 1). Leslie Gradick is forbidden by law to involve himself in any radio station in the Coosa, Georgia vicinity since he has a Covenant Not To Compete, which expires on January 15, 1994 (Gradick Exh. 1, pp. 1-2). The Covenant Not To Compete specifies that Gradick is prohibited from involvement in any radio station within ten miles of Rome, Georgia (Gradick Exh. 1, pp. 5-6).

5. Leslie Gradick proposes to be integrated 100% into the day-to-day management of the proposed station. Mr. Gradick will devote a minimum of 40 hours per week to his duties at the station. Mr. Gradick will make all policy decisions with respect to the proposed station. He will serve as general manager of the station and as such, he will supervise all day-to-day operations of the proposed station. His responsibilities will include, among other things, the direct supervision of all management level employees. Mr. Gradick will be responsible for all decisions, including the hiring and termination of employees and the implementation of the station's equal opportunity policy (Gradick Exh. 1, p. 2).

6. Gradick will resign from any then employment and assume his duties as general manager of the station, should his application be granted. He will be available full time no later than the grant of program test authority (Gradick Exh. 1, p. 2).

7. When Gradick's application was filed in this proceeding on May 30, 1990, he was also an individual applicant for a new FM station at Attalla, Alabama, having filed for it on January 19, 1990 (Kendrick Exh. 3, p. 1; Tr. 11). Rather than submit an integration statement as part of his original application in this proceeding, Gradick informed the Commission that he "elects the option to file [his] integration proposal by the amendment-as-of-right date...." (Kenrick Exh. 3, p. 2; Tr. 11). On July 2, 1990, Gradick filed an amendment to his application in this proceeding stating that he proposed to be "100% integrated into the management" of the station proposed in this proceeding, but that his integration "proposal is on a contingent basis because [he] has previously stated his intentions to be "integrated into a proposed FM facility at Attalla, Ala-

bama. . . ." (Kendrick Exh. 3, p. 4; Tr. 11-12). Following designation of this case for hearing, Gradick filed a petition for leave to amend and an amendment on August 7, 1991, in which he stated that his Attalla, Alabama application had been dismissed pursuant to settlement agreements approved by the Commission on June 10, 1991, which approval became final as of July 30, 1991 (Kendrick Exh. 3, pp. 5-8: Tr. 12-13).

8. Mr. Gradick currently resides at Rome Georgia but he proposes to relocate to Bolingbroke, Georgia, should his application be granted (Gradick Exh. 1, p. 2).

9. Mr. Gradick is a registered professional engineer, having received a degree in electrical engineering at the Georgia Institute of Technology in 1950 (Gradick Exh. 1, p. 3).

10. For 29 years, Mr. Gradick owned and managed three radio stations in Georgia, which he also built. Mr. Gradick made policy decisions as general manager of the stations, supervising all phases of the operations and all management-level employees on a day-to-day basis. Mr. Gradick was responsible for all decisions, including the hiring and termination of employees and the implementation of the station's equal employment opportunity policy (Gradick Exh. 1, p. 3).

11. Mr. Gradick's past broadcast experience is as follows:

1950:	Engineer, WSB - Atlanta, Georgia
1950-1959:	Engineer, WAOK - Atlanta, Georgia
1959-1988:	Owner and General Manager, WIYN - Rome, Georgia; WPLK-AM, WZOT-FM - Rockmart, Georgia
1988 - Present:	Engineering Consultant, Christian Science Monitor, International Broadcast Station WSHB - South Carolina

(Gradick Exh. 1, p. 3).

12. Mr. Gradick will acquire, install and operate an auxiliary power source for the emergency operation of the station during any commercial power outages. In the event the studio is not co-located at the transmitter site, an emergency power source will be installed at both locations (Gradick Exh. 1, p. 3).

Joseph I. Kendrick

13. Kendrick is an individual applicant. No other person has any interest in his application or his proposed station (Kendrick Exh. 1, p. 1).

14. Kendrick does not have any interest in or association with any medium of mass communications (*Id.*).

15. Kendrick proposes to work full time, at least 40 hours each week at his proposed station. He will perform the duties normally associated with being the general manager of a small town radio station, including hiring, promotion, termination and daily supervision of all employees; he will select programming formats, obtain financing, supervise all financial aspects of the operation of the station and establish sales policies and advertising rates. Kendrick proposes to be present at the station on weekdays for at least eight hours each day between the hours of 8:00 a.m. and 6:00 p.m. on a regular basis and will devote additional time to the station at nights and on weekends on an as needed basis (*Id.*).

16. Kendrick has interests in or associations with four existing retail pawn and jewelry businesses located in Macon, Georgia, which is about 14 miles from his home in Bolingbroke (*Id.*). He is the sole proprietor of one of these businesses, owns another with his wife, owns another with one Mike Ballard, and the fourth business is owned by Mr. Kendrick's wife and son (*Id.* pp. 1, 3). Kendrick now serves as the general manager of his sole proprietorship, working about eight hours per day at that location. Typically, he also visits the locations of two of the other businesses, one of which is run by his son and the other by a general manager, several times each week for about 30 minutes. The fourth business is managed by Mr. Ballard, and Mr. Kendrick typically visits it once every two weeks for about 30 minutes (*Id.*)

17. When Kendrick assumes his duties as general manager of the station proposed in this proceeding, he will appoint Mr. Emmette Carter as the general manager of his sole proprietorship and will visit with Mr. Carter two or three times each week for about 30 minutes (*Id.*). Mr. Carter has worked at this business on a full time basis since 1978, and has agreed to take over the day-to-day functions of the business now handled by Kendrick. Although final plans have not been made for additional staffing at the store, an additional full time sales clerk may be hired to assist Mr. Carter when Mr. Kendrick assumes his duties at the proposed radio station (*Id.*). Also, Kendrick will continue to visit these businesses on a sporadic basis, in a manner similar to his present visits to them. (*Id.*) Some of these visits will take place during normal business hours and some will take place in the evenings or on Saturdays; however, Kendrick will devote at least 40 hours between the hours of 8:00 a.m. and 6:00 p.m. weekdays each week exclusively to station business. He anticipates that he will devote about four hours each week on average to these other businesses once his station has commenced operation (*Id.* pp. 3-4).

18. Since 1986, Kendrick has resided within the limits of the corporate boundaries of Bolingbroke as those boundaries were described in a now inactive state of Georgia Charter for the town (*Id.* p. 4). From 1963 to 1986, Kendrick lived in other locations, all of which are within the primary (1 mV/m) service area of his proposed station. Upon grant of his application, Kendrick will continue to live in Bolingbroke. Kendrick has been an active member of the Bolingbroke Community Club since its founding in 1988. He has attended many of the monthly meetings held by the club and has participated in several functions sponsored by the club to benefit Bolingbroke (*Id.*).

19. Kendrick proposes to install auxiliary power equipment at the transmitter and studio sites for his proposed station in order to insure the continued operation of the station in the event of the loss of electric power from the usual source (*Id.*).

Comparative Coverage

20. The applicants have stipulated that there is no decisionally significant difference between the areas and populations they propose to serve (Joint Exh. 1).

Conclusions of Law

Diversification

21. Neither applicant has any cognizable ownership interests in or associations with any existing media of mass communications. Accordingly, they are equal under this criterion and neither is entitled to a preference.

Best Practicable Service

Leslie E. Gradick

22. Gradick proposes 100% quantitative integration, but he may not be credited with any integration. When Gradick filed his application, he did not include a description of his integration proposal. Instead, he elected to wait until the amendment as-of-right date. On that date, he filed an amendment which described his integration proposal, but explicitly stated that it was "contingent" on the outcome of proceedings on his Attalla, Alabama application, *i.e.*, he stated that he would work full time at his Bolingbroke station if "there is a settlement in Attalla or an event resulting in the dismissal of [that] application." The Commission has held that integration pledges subject to a contingency over which the applicant has no control may not be credited. *Charisma Broadcasting Corp.*, 6 FCC Rcd 3411, 3413, para. 10 (Rev. Bd. 1991); *Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978). It is concluded that Gradick's claim for 100% quantitative integration credit must be denied. Gradick argues that the contingency was removed by the time the Presiding Judge required the integration statements to be filed. Gradick misconstrues *Order* FCC 91M-2017, released June 28, 1991. That order required that the parties provide each other and the Presiding Judge with, among other things, a copy of their respective integration proposals. The order did not alter the Commission's policy that integration statements must be filed by the amendment as-of-right date and should the applicant fail to disclose its integration claims no credit will be given. *See* Commission's *Report and Order In re Revision of Application* for *Construction Permit for Commercial Broadcast Station*, (FCC Form 301, 4 FCC Rcd 3852). Up to the amendment as-of-right filing date, Gradick's proposal was contingent and therefore not creditable. It's subsequent post-designation attempt to change the contingency was an impermissible upgrade. *See Inlet Broadcasting Co.*, 5 FCC Rcd 3192 (Rev. Bd. 1990).

23. Were Gradick's integration claim credited, it would have entitled Gradick to a very slight qualitative enhancement for his proposal to move to Bolingbroke and somewhat greater enhancement for his broadcast experience.

Joseph I. Kendrick

24. Kendrick is entitled to 100% integration credit. Kendrick has demonstrated that his other business interest will not conflict with his integration proposal. He intends to use the same management procedures at the business he now oversees on a day-to-day basis as he now employs at three other similar businesses. There is no factual or legal basis for denying Kendrick 100% quantitative integration credit.

25. Kendrick is also entitled to substantial qualitative enhancement credit for his long time local residence of some five years in the community of license and an additional 23 years in the service area, and this preference is slightly increased by his limited civic activities.

26. The award of 100% quantitative integration credit to Kendrick and the denial of all such credit to Gradick is the determining factor in this case. *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 (1989) (substantial differences in quantitative integration credit cannot be overcome by superior qualitative enhancements). However, even if Gradick were entitled to 100% quantitative integration credit, Kendrick would still be the superior applicant. Kendrick's qualitative enhancement preference for more than 25 years of local residence is entitled to significant credit. *Colonial Communications, Inc.*, 5 FCC Rcd 1967, 1969 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 2296 (1991). On the other hand, Gradick's broadcast experience is a factor of minor significance and does not outweigh Kendrick's long term residence. *Policy Statement on Comparative Broadcast Hearings, supra*, 1 FCC 2d 396; *Beach Broadcasting Ltd. Partnership*, 6 FCC Rcd 4485 (1991).

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Joseph I. Kendrick (File No. BPH-900531ME) IS GRANTED; the application of Leslie E. Gradick (File No. BPH-900530MG) IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] The application of Donald L. Jones was dismissed by *Order*, FCC 91M-2321, released July 29, 1991 and the application of Q3 Corporation was dismissed by *Order*, FCC 91M-2387, released August 2, 1991.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington D. C. 20554

In the Matter of

CHARTER NETWORK
COMPANY, L.P.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY, and WISCONSIN BELL, INC.,
Defendants.

File No. E-89-414
File No. E-89-415

ORDER

Adopted: June 8, 1992; Released: June 15, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, Charter Network Company, L.P. (hereinafter "Charter") filed the above-captioned formal complaints against Michigan Bell Telephone Company and Wisconsin Bell, Inc. (hereinafter the "Defendants") seeking recovery of damages for the Defendants' alleged overearnings on interstate access services for the period October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2. The parties to the above-captioned complaints have conducted discussions aimed at settling the complaints. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On June 3, 1992, the parties filed a joint motion seeking dismissal of the complaints. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaints IS GRANTED and that the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILLIAMS TELECOMMUNICATIONS GROUP, INC., Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-397
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-398
SOUTHWESTERN BELL TELEPHONE COMPANY, and	File No. E-89-399
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-400

Defendants.

ORDER

Adopted: June 8, 1992; Released: June 15, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Williams Telecommunications Group, Inc. (WTG) may be entitled to recover damages as a result of defendants'[1] alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that WTG presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned case.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

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[1] Northwestern Bell Telephone Company (NWB), Mountain States Telephone and Telegraph Company have consolidated. U S West Communications, Inc. (U S West) is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaint, however, was filed prior to the consolidation. Accordingly, we shall refer to the carrier as it was named in the complaint.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[4] The complainants relied, as does WTG in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. released May 11, 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. released May 11, 1992).

[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

III. CONTENTIONS OF THE PARTIES

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. WTG's damage claims rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8] WTG has asked the Commission to direct defendants to provide such computations by directing show cause orders to the defendants similar to those issued by the Common Carrier Bureau (Bureau) in the MCI and AT&T proceedings.[9] In addition, WTG has propounded interrogatories to each defendant that asks each defendant to provide a calculation of its overearnings for each service and/or service segment that is the subject of WTG's complaints.[10]

5. The defendants raise a number of threshold challenges to the complainant's damage claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[11] The defendants argue in unison that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[12] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rate of return was below the authorized level.[13] Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. Some defendants contend that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.[14]

6. Defendants also advance a number of arguments in opposition to complainant's discovery request. Some defendants argue that the requests are premature at this stage in the proceeding because there has been no finding of liability.[15] Some defendants argue that contrary to the complainant's claims, the *MCI Liability Order* did not affirm the Bureau's show cause orders which required defendants to calculate actual damages potentially owing to MCI.[16] The defendants maintain that they have no legal obligation to compute damages for complainant and argue the burden is on complainant to plead and prove damages.[17]

7. In response, WTG maintains that the *MCI Liability Order* specifically found the defendants liable for damages stemming from rate of return violations during the October 1, 1985 - December 31, 1986 monitoring period. WTG notes that its request for information on damages is specifically tailored to the Bureau's orders issued in the AT&T and MCI liability proceedings. It adds that the Commission in those proceedings clarified the Bureau's authority to require the defendants to produce evidence in their possession on the issue of damages.

IV. DISCUSSION

8. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which WTG may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with WTG, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return

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[8] WTG also seeks interest on this amount. We note that NWB argues that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant proceedings will depend on the particular facts established by the parties.

[9] *See e.g., MCI Telecommunications Corp. v. C & P*, 4 FCC Rcd 6107 (Com.Car.Bur. 1989).

[10] WTG uniformly conditioned its requested calculation, by asking each defendant to

> assume a study area defined by the geographical reach of [defendant's] filed tariffs, a maximum allowable rate of 13.1 percent overall interstate earnings, and a maximum allowable rate of return for any access service category of 13.25 percent.

[11] The issues and arguments raised by defendants in response to WTG's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[12] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[13] Additionally, NWB contends that the relevant overall interstate rate of return is that of U S West in the aggregate, not each of U S West's component operating companies. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See e.g.*, 5 FCC Rcd 146 and 148 (1990).

[14] *See, e.g.*, NWB Answer at Para 16.

[15] *See, e.g.*, NJB Opposition to Motion to Compel at 3; NWB Opposition to Motion to Compel at 2.

[16] SWBT assserts that it has previously provided WTG overearnings data with its answer and motion to dismiss. In its reply, WTG acknowledges receipt of the overearnings information, but states that the information is not fully responsive to the information WTG seeks on damages.

[17] *See, e.g.*, C&P Opposition to Motion to Compel at 3; NJB Opposition to Motion to Compel at 3.

violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainants suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that WTG's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding WTG's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute WTG's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

9. The defendants' argument that discovery regarding damages is premature is unavailing since we have decided not to adopt a bifurcated approach in these proceedings. Rather, as stated above, we have concluded that the parties' and the Commission's interests in obtaining the earliest practicable resolution of this matter will be better served by requiring the parties to develop a full record on the issue of liability and damages at this time. Accordingly, we will grant complainant's motion to compel to the extent indicated herein and will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 8 herein.

V. CONCLUSION

10. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[18]

VI. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that complainant's Motions to Compel ARE GRANTED to the extent indicated herein and are otherwise DENIED. Within 10 days of the release date of this order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraphs 8 and 9 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

12. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 8 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

13. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[18] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-257

In re Applications of

LA STAR CELLULAR TELEPHONE COMPANY — File No. 27161-CL-P-83

For construction permit for facilities operating on Block B in the Domestic Public Cellular Radio Telecommunications Service in the New Orleans, Louisiana MSA

and

NEW ORLEANS CGSA, INC. — File No. 29010-CL-P-83
File No. 29181-CL-P-85

To amend its construction permit for facilities operating on Block B in the Domestic Public Cellular Radio Telecommunications Service, Call Sign KNK224, in the New Orleans, Louisiana MSA

Appearances

L. Andrew Tollin, Luisa L. Lancetti, Pierre J. LaForce, Richard A. Hindman and F. Thomas Moran, and Martin T. Walsh and Marcy A. Bass (of counsel) on behalf of New Orleans CGSA, Inc.; *Arthur V. Belendiuk, Lisa Thornton, Robert W. Healy, Russell E. Arkin, and J. Daniel Gillick* on behalf of La Star Cellular Telephone Company; *Alan Y. Naftalin and Herbert D. Miller, Jr.* on behalf of United States Cellular Corporation; and *R. Barthen Gorman* on behalf of Chief, Common Carrier Bureau.

DECISION

Adopted: June 5, 1992; Released: June 15, 1992

By the Commission:

I. INTRODUCTION

1. In this proceeding, New Orleans CGSA, Inc. (NOCGSA), which holds a license to operate a cellular telephone system on frequency Block B in the New Orleans MSA, seeks to extend its geographic service area into St. Tammany Parish, Louisiana. La Star Cellular Telephone Company (La Star) filed a mutually exclusive application to operate a cellular system in St. Tammany Parish. Now before the Commission is an initial decision by Administrative Law Judge Joseph Chackin dismissing La Star's application as unacceptable for filing. *La Star Cellular Telephone Co.*, 6 FCC Rcd 6860 (I.D. 1991).

2. The ALJ found that La Star is ineligible to file for frequency Block B because it is not controlled by a wireline carrier with a presence in the cellular market as required by 47 C.F.R. § 22.902(b).[1] La Star is a joint venture owned 51 percent by SJI Cellular, Inc. (SJI) and 49 percent by Star Cellular Telephone Co. (Star). SJI's parent company, SJI, Inc., also owns Lafourche Telephone Company (Lafourche), a telephone company serving a portion of the New Orleans MSA. SJI is therefore eligible to apply for frequency Block B in the New Orleans MSA. By contrast, neither Star's parent company, United States Cellular Company (USCC) nor USCC's parent, Telephone and Data Systems, Inc. (TDS), is eligible to apply in New Orleans. The ALJ found that Star, not SJI, controls La Star, making La Star ineligible. La Star has appealed its dismissal.[2]

3. For the reasons that follow, we find that the record demonstrates that La Star is not controlled by a wireline-eligible carrier.[3] We therefore agree with the ALJ that La Star's application should be dismissed and NOCGSA's application should be granted.[4]

II. INITIAL DECISION

4. In evaluating the control of La Star, the ALJ made findings on the circumstances surrounding the formation of La Star and the prosecution of its application. On June 7, 1982, NOCGSA's predecessor-in-interest, American Mobile Phone Service, Inc. (AMPS), filed its original application to serve the New Orleans MSA.[5] SJI, headquartered in LaRose, Louisiana, 50 miles south of New Orleans, did not file a mutually exclusive application. AMPS application was granted on July 11, 1983. 6 FCC Rcd at 6861 ¶¶ 10-12.

5. On August 1, 1983, AMPS filed an application to expand its geographic service area by constructing two cells in St. Tammany Parish, which lies across Lake Pontchartrain from the rest of the New Orleans MSA. La Star filed its mutually exclusive application to construct six cells in St. Tammany parish on September 16, 1983. 6 FCC Rcd at 6861 ¶¶ 13-14.

6. The sequence of events leading to the formation of La Star and the filing of its application began earlier in 1983. In March 1983, Star (subsequently La Star's 49 percent partner) filed an application for a cellular system on Block B in Baton Rouge, Louisiana. At that time, Star was 51 percent owned by Cail Enterprises, Inc. (wireline eligible in Baton Rouge) and 49 percent owned by Maxcell Telecom Plus (wireline ineligible). Shortly thereafter, Cail's principal, Alvin E. Kimble, told John A. Brady, Jr., the president of SJI, that one of Maxcell's principals, William Erdman, had a proposal for St. Tammany. (Maxcell has filed in several wireline markets as a minority partner and has filed in several non-wireline markets as a controlling partner.) 6 FCC Rcd at 6862 ¶¶ 16-21.

7. The ALJ found that from the beginning Maxcell's Erdman dominated the formation of La Star and the prosecution of its application, whereas SJI's Brady remained passive. John Brady and his brother James met with Erdman in Washington to execute a joint venture agreement that had been prepared and delivered by Erdman. The agreement was very similar to the agreement involved

in Baton Rouge and provided that La Star would be governed by a five-person management committee, three of whose members would represent the eligible partner. The agreement contained provisions requiring an 80 percent vote of La Star's management committee for 13 different actions including the appointment and termination of the general manager and the settlement of litigation (thereby effectively giving Star a veto over these actions). Erdman refused to modify these provisions although Brady's local attorney had advised Brady to seek their modification. The agreement provided that Star would finance the prosecution of the application and that SJI would have no financial exposure until after a construction permit had been granted. 6 FCC Rcd at 6862-63 ¶¶ 23-32.

8. Erdman then arranged for the preparation of La Star's application. He hired William Franklin, who had previously been associated with Maxcell, as La Star's attorney. Franklin, in turn, hired Dr. Andy Anderson and Dr. James Wright, both of whom were associated with Maxcell, to prepare a demand and demographic study. A Maxcell engineer, Nadia Adawi, did the engineering work for the application. A Star principal, I. V. Jeansonne, executed the cell site agreements for La Star and Star worked with a local real estate agent, Maxey Resweber, in this regard. Franklin, Anderson, Wright, Adawi, and Jeansonne also worked on the Baton Rouge application. SJI's Brady did not participate in any of these matters and testified that he gave Erdman and Franklin unlimited authority. Erdman also obtained a bank commitment from the American Security Bank for La Star (as was the case in Baton Rouge). La Star's cost-based rate structure was designed by Cornell, Pelcovits & Brenner Economists, who previously designed a similar rate structure for the Baton Rouge application. 6 FCC Rcd at 6863-64 ¶¶ 33-39, 42-43.

9. On October 1, 1984, the Common Carrier Bureau dismissed La Star's application as untimely (because it had not been filed during the original 1982 filing window for the New Orleans MSA). The ALJ found that Maxcell, rather than SJI's Brady, took the initiative in appealing this action. Maxcell General Counsel, Kent Y. Nakamura, hired Arthur V. Belendiuk, who conducted litigation for Maxcell in other proceedings, as La Star's new lawyer. Belendiuk and Nakamura filed pleadings in connection with an unsuccessful appeal to the Commission. Belendiuk then filed an appeal with the United States Court of Appeals for the District of Columbia Circuit. On April 7, 1987, the court ordered the Commission to reinstate La Star's application. 6 FCC Rcd at 6865 ¶¶ 44-46. *See Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1560 (D.C. Cir. 1987).

10. Belendiuk thereupon retained personnel to do further work on the application. He hired Richard Biby as a consulting engineeer, and once again retained Anderson and Wright to prepare demographic and demand studies, and Resweber to do cell site work. Brady was not involved in these decisions. 6 FCC Rcd at 6865 ¶ 47.

11. The ALJ noted that, during the pendency of La Star's appeal, SJI applied in its own right for a cellular system in the Houma-Thibodaux, Louisiana MSA. The ALJ found it significant that in prosecuting that application, which did not involve Maxcell, SJI proceeded in a manner totally different from that in New Orleans. SJI used a different law firm and bank. It did not use Belendiuk, Biby, Anderson or Wright, or Resweber. 6 FCC Rcd at 6865 ¶ 48.

12. Shortly after the court reinstated La Star's application, Star's principals decided to sell their 49 percent interest in La Star. SJI declined to exercise its option under the joint venture agreement to purchase Star's interest. On July 31, 1987, USCC purchased this interest for $327,000. Like Maxcell, USCC is a company involved in numerous cellular systems. Despite the change in ownership, the parties did not modify the joint venture agreement, and SJI did not meet with USCC personnel until after USCC acquired the 49 percent interest. 6 FCC Rcd at 6856 ¶¶ 49-52.

13. The ALJ found that after the sale SJI did not observe the formalities of the joint venture agreement or assume control of La Star. Instead, the ALJ found that USCC took over the control of La Star formerly exercised by Maxcell.

14. The ALJ found that, after USCC aquired its interest, La Star's management committee met only once, in August 1987.[6] Following that meeting, in Chicago, USCC assumed all responsibilities for preparing and prosecuting La Star's application. During this subsequent period, contrary to the provisions of the joint venture agreement, no management committee meetings were held, no financial audits were conducted, no general manager was appointed, and no engineering subcommittee was established. 6 FCC Rcd at 6866 ¶¶ 55, 57.

15. On October 26, 1987, La Star filed an amendment to its application. The ALJ found that, aside from updating its own ownership information, SJI had no involvement in preparing this amendment. Rather, USCC handled all of La Star's affairs. Shortly before the amendment was filed, USCC's accounting manager, Mark Krohse, prepared a memorandum listing various La Star matters requiring attention. SJI did not receive a copy of the memo. Krohse and USCC president, H. Donald Nelson, handled La Star's day-to-day finances. USCC paid La Star's expenses and kept La Star's financial records, which SJI never reviewed. USCC's Nelson, Richard Goehring (vice president of engineering and operations), and Kenneth Meyers (vice president of finance, treasurer) prepared a budget for La Star. Nelson dealt with Anderson and Wright concerning their demographic studies. Goehring coordinated the engineering work with La Star's consulting engineers. Krohse prepared La Star's proposed rate structure using data from other USCC cellular systems. Nelson and Goehring executed cell site documents in USCC's name. La Star's financial qualifications were based on a loan commitment by USCC's parent company, TDS. 6 FCC Rcd at 6866-68 ¶¶ 58-74, 76-77.

16. The ALJ found that after La Star filed its amendment, USCC continued to handle La Star's day-to-day business without any significant involvement by SJI. USCC prepared a reply to NOCGSA's opposition to La Star's amendment. Later, in February 1988, USCC prepared an application for interim authority to operate in St. Tammany Parish. 6 FCC Rcd at 6868-69 ¶¶ 78-82.

17. The ALJ also noted another matter indicating the degree of USCC's involvement. USCC (and TDS) prepared La Star's income tax returns. Beginning in 1989, Star (USCC) was designated La Star's tax partner and the address on La Star's tax returns was USCC's. In 1988, the IRS contacted SJI's Sinclair Crenshaw (SJI's house counsel and contact point for tax matters) because it did not receive La Star's 1988 tax return. Crenshaw merely referred the IRS' inquiry to USCC's Krohse, who never discussed the matter with Crenshaw. When the IRS made a

second inquiry in 1989, about the missing 1988 return, Crenshaw's secretary referred the matter to Krohse without notifying Crenshaw. 6 FCC Rcd at 6869 ¶¶ 83-87.

18. The ALJ found it significant that SJI did not take steps to involve itself in La Star's affairs until after the Commission designated an issue as to the control of La Star on May 31, 1990. Only after that time did SJI keep La Star's financial records, and sign site renewals, and deal directly with La Star's engineering consultant. Additionally, at that time, SJI first began to share the expenses of prosecuting La Star's application.[7] 6 FCC Rcd at 6868-70 ¶¶ 75, 89-93.

19. In view of the foregoing, the ALJ concluded that, from the outset, Maxcell, and later USCC, totally dominated La Star's affairs. He further concluded that SJI had failed to explain its own nonparticipation in La Star's affairs, and, for example, had not demonstrated that it had validly delegated responsibilities to USCC or Belendiuk. Consequently, the ALJ concluded that, because La Star was not controlled by a local wireline carrier, it was ineligible to apply for the Block B frequency in New Orleans and that its application should be dismissed. 6 FCC Rcd at 6885-88 ¶¶ 212-23.

III. EXCEPTIONS

20. La Star and USCC[8] contend that the ALJ did not have a valid basis to find that La Star was ineligible. They argue that the ALJ should not have taken into account events that occurred before USCC acquired its interest in La Star in 1987. They read the issue discussed in the hearing designation order -- whether SJI "maintains" control of La Star -- as referring only to SJI's current control, since the issue is worded in the present tense.

21. The parties also contend that the ALJ incorrectly evaluated the post-acquisition record. According to the parties, USCC's involvement in the preparation and prosecution of La Star's application has little probative value. They maintain that, once La Star receives a grant, SJI can be expected, in view of its financial interest in La Star's operations, to assert control over system operations, as it has historically done with respect to its other properties. They submit that USCC considers the New Orleans system as a relatively trivial part of its business and will treat it as a passive investment. The parties claim that SJI validly delegated the relatively ministerial function of preparing and prosecuting the application to USCC, but retained the right to make basic decisions. The parties further claim that SJI exercised its control by giving instructions to attorney Belendiuk, who, in turn, gave directions to USCC. The parties point out that, unlike a limited partner, USCC was not barred from playing this role. In this regard, the parties contend that prior to a grant there was no need to conduct management committee meetings or hire a general manager, since there was no ongoing business to manage. They claim that SJI's Brady made specific decisions indicating his control.

22. Additionally, the parties assert that there is no evidence that USCC ever coerced SJI by either: (1) exercising the provisions of the joint venture agreement giving USCC a veto over certain actions,[9] or (2) threatening to withhold financial support.

23. Finally, the parties contend that the ALJ exaggerated USCC's role in preparing and prosecuting the application. Rather, they urge that USCC simply performed ministerial functions at the request of SJI or Belenduik. Specifically, they submit that: (1) USCC did not select cell sites, but merely routinely administered their renewal; (2) USCC personnel did no engineering work but only paid La Star's outside consultant to do so; (3) USCC merely contributed some factual information to the preparation of La Star's 1987 amendment; (4) because La Star had no income, the preparation of its tax returns was a mere formality; and (5) the TDS financial commitment to La Star was an arm's length transaction made after Brady was unable to get more favorable terms from any bank.

IV. DISCUSSION

24. We find that the record in this case amply demonstrates that SJI does not control La Star, and, therefore, La Star is ineligible to apply for frequency Block B in the New Orleans MSA.[10] La Star's application is unacceptable for filing and will be dismissed.[11]

25. At the outset, we disagree with La Star's arguments contesting the scope and probative weight of the record compiled here. We find that: (1) the record as to the control of La Star prior to USCC's purchase of an ownership interest in 1987 is relevant, and (2) the evidence as to the control of the preparation and prosecution of La Star's application is probative in this case. The record as to these matters indicates that SJI has not controlled La Star. As the ALJ's findings (which La Star does not challenge in any significant respect) demonstrate, during the pre-1987 period Maxcell, not SJI, controlled La Star's affairs. Additionally, as appears in the ALJ's findings and the discussion below, USCC's control of La Star is amply supported by the evidence concerning the prosecution of La Star's application after 1987.

26. In this regard, the crucial consideration is that the issue of control is essentially factual. The Commission examines not only the applicant's formal legal control but also the special factual circumstances indicating that a party which claims to have only a minority interest actually controls the applicant. *See WWIZ, Inc.*, 36 FCC 561, 579 ¶ 3 (1964). *See also Data Transmission Co* 44 FCC 2d 935, 936 (1974). We further take into account a party's demonstration of power to dominate the management of the applicant's affairs. *News International, PLC*, 97 FCC 2d 349, 355-56 ¶ 16 (1984), *citing Benjamin L. Dubb*, 16 FCC 274, 288-89 ¶ 3 (1951).

27. Because of the factual nature of this inquiry, we must give probative weight to the facts as they are developed on the record. Where a substantial question exists about the applicant's control, as here, we cannot simply accept as conclusive a party's unsupported, self-serving claim that it does, or will, exercise control. Hence, in this case, we cannot simply assume that SJI exercised control over La Star prior to USCC's participation in 1987. Absent a reliable showing that SJI, and not USCC, controlled La Star's affairs after 1987, we are justified in considering whether SJI controlled La Star prior to 1987, since USCC may have acquired *de facto* control previously exercised by Maxcell when it acquired Maxcell's interest.[12] *See Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5600-01 ¶ 12 (1991) (in determining control of an applicant, the Commission will examine pre-formation activities of the parties, where the post-formation record is inconclusive). Indeed, the record here shows a consistent pattern, both before and after 1987, of SJI's passivity in La Star's affairs in relation to Maxcell and later USCC.

28. Similarly, as the parties point out, La Star does not currently operate its proposed St. Tammany Parish system, and we have no way of observing the *de facto* control of such a system.[13] In the absence of such evidence, the record as to the preparation and prosecution of La Star's application provides the most probative basis to evaluate the control of La Star. For the reasons already stated, we cannot accept at face value La Star's claim that SJI will exercise control once it has received a construction permit.

29. In this regard, we do not credit the argument that SJI can be expected to control La Star because it has operated cellular systems in its own right in the past, because USCC has been a passive investor in some cellular systems in the past and because USCC considers its interest in La Star to be of minor importance. We cannot ignore what the record shows about the parties' treatment of this system specifically, especially since an incentive may have existed for SJI to "lend" its wireline eligibility to an otherwise ineligible applicant. We note that SJI had the opportunity to apply for authorization in New Orleans in its own right, when AMPS filed its original application, but chose not to do so. Tr. 837, 860. We also note that, in 1986, SJI prosecuted an application in its own right in the Houma-Thibodaux MSA and obtained legal counsel, engineering support, and a financial commitment from sources other than those used in New Orleans. Tr. 900-02, 962-63. Thus, the record indicates that SJI did not proceed in New Orleans as it did elsewhere. As a related matter, we see no justification for taking into account La Star's post-designation "corrective action" designed to demonstrate that SJI has recently sought to establish additional control over La Star. *See* note 20, *infra*. Crediting such belated attempts made under Commission scrutiny years after the filing of La Star's application would render the wireline eligibility requirement inefficient and unreliable.

30. With the foregoing in mind, we turn to La Star's principal argument, that USCC's involvement in the prosecution of La Star's application represented a valid delegation of day-to-day administrative functions from SJI to USCC. This point is critical since (1) La Star does not seriously challenge the ALJ's finding that prior to 1987 Maxcell controlled La Star's affairs, (2) La Star does not dispute that after 1987 USCC participated extensively in the prosecution of La Star's application, and (3) the record contains little evidence of SJI's active participation in La Star's affairs. Thus, unless La Star can demonstrate that USCC's extensive participation reflected a delegation of authority from SJI, it has no basis to dispute that USCC's activities reflected USCC's own control, which merely perpetuated the pattern established by Maxcell. (It is therefore irrelevant that, as La Star argues, USCC is not barred from participating in La Star's affairs, as a limited partner would be.) As La Star correctly points out, the Commission has said in, for example, *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715-16 (1981), that a licensee may delegate its day-to-day operations to another entity without transferring control, where the licensee retains the right to determine basic policies governing these operations. However, in *Southwest Texas*, the licensee made a specific affirmative showing that it had in fact actively established operational policies. The licensee's corporate minutes reflected that its board had formally adopted operating policies that were, in fact, carried out without delay or the need for concurrence by the licensee's delegate.[14]

31. Here, by contrast, the record conspicuously fails to support SJI's claim that it determined La Star's policies. Significantly, the record reflects no regular meetings (indeed, only a single meeting during USCC's ownership) -- even telephone conferences -- of the management committee designated by the joint venture agreement to govern La Star.[15] Nor does the record contain minutes or other records of decision making consistent with the joint venture agreement. La Star thus failed to show that SJI exercised control over La Star's affairs as provided in the joint venture agreement -- by virtue of SJI's majority on the management committee. *Compare News International, PLC*, 97 FCC 2d at 358 ¶ 21 ("This is not a case with an existing record showing that the parties have departed from their agreement and representations."). We see no merit to La Star's argument that the failure to hold management committee meetings can be explained because the committee was not needed in the absence of an ongoing business. The fact remains that the management committee (whether acting formally or informally) reflects the provisions of the joint venture agreement. We cannot simply assume that a failure to abide by these provisions is innocuous.

32. Although La Star makes no attempt to demonstrate that SJI exercised control through the management committee, as provided in the joint venture agreement, La Star does claim that SJI exercised control in an alternative manner, which is not provided for in the joint venture agreement. According to this explanation, SJI unilaterally controlled La Star by means of instructions to USCC that were conveyed to USCC by attorney Belendiuk. The record does not, however, support this claim. La Star does not explain why USCC would be willing to forego its right to participate in management committee deliberations in this manner. Moreover, SJI's connection with Belendiuk is tenuous. Belendiuk was recommended as La Star's counsel by Maxcell's general counsel, Nakamura; SJI's Brady had not met Belendiuk at that time. Tr. 1120-22. Nakamura worked with Belendiuk on La Star's litigation. *Id.* And, according to Commission records, Belendiuk also represented Maxcell in related proceedings.[16] By contrast, when SJI prosecuted its Houma-Thibodaux application, it used -- and continues to use -- counsel other than Belendiuk. Tr. 900-01. Thus, the record ties Belendiuk more closely to La Star's original minority partner rather than to SJI.

33. Significantly, La Star fails to cite any evidence -- beyond generalized, self-serving claims -- to support the contention that SJI supervised Belendiuk. Rather, the documentary evidence and the specific testimony of the witnesses describes circumstances in which, to all appearances, Belendiuk was USCC's attorney and USCC supervised the prosecution of the application. Belendiuk's communications to USCC do not demonstrate otherwise, since attorneys typically advise their clients how to proceed, and Belendiuk's actions can readily be interpreted as such typical conduct.

34. The deficiencies in La Star's showing in this regard becomes particularly evident when the actions that Brady claims demonstrate that SJI controlled La Star (La Star Exh. 12 at 12-17) are measured against the record as a whole.[17] For example, Brady claimed: "In 1987, I directed the preparation of La Star's 1987 amendment." *Id.* at 14. What the record demonstrates, however, is USCC's supervision of the work related to the amendment. Matters related to the amendment -- the need to prepare a budget, to do work on cell sites, and to do engineering work --

were discussed in a September 28, 1987 memorandum from USCC official, Krohse to his superior Nelson. NOCGSA Reb. Exh. 22 at 2. Work on the amendment was coordinated by USCC officials (as suggested by the memorandum). Krohse himself prepared the budget based on information supplied by La Star's consultant, Anderson, and also prepared La Star's proposed rates, using a USCC reference book as a source (although the rates were supposedly cost-based). Tr. 1531, 1552-53, 1556. Nelson dealt directly with Anderson concerning Anderson's demographic study. NOCGSA Exh. 17; tr. 1371-74. Goehring coordinated engineering matters related to the amendment. NOCGSA Reb. Exhs. 18-20; tr. 1354, 1366, 1479, 1481, 1483-1485, 1487. Nelson signed cell site documents himself. NOCGSA Reb. Exh. 16, Bates Nos. 105-08; tr. 1368.

35. By contrast, the record contains no evidence that any of these matters were coordinated with Brady or any SJI personnel. Nelson testified that he did not discuss the amendment with Brady at all and received no specific requests directly from SJI or the management committee. Tr. 1448-49, 1453-54. At the hearing, Brady did not know, for example, how La Star's proposed rates had been calculated or who had calculated them. Tr. 1001-02.

36. Similarly, Brady states that: "I was advised of the fact that NOCGSA had filed a petition to deny La Star's application and amendment. I directed counsel to prepare and file an appropriate reply." La Star Exh. 12 at 15. The record, however, contains a February 19, 1988 memorandum from Krohse to Nelson, Meyers, and Goehring stating that Krohse had spoken to La Star's counsel and discussing the need to respond to the allegations in NOCGSA's petition to deny (that La Star had specified insufficient funds to construct the proposed system). NOCGSA Reb. Exh. 22 at 1. Goehring testified that in response to these concerns he reviewed past USCC budgets, concluded that La Star's budget was sufficient, and executed an affidavit used in responding to NOCGSA's petition. Tr. 1477-79. The record discloses no participation or oversight by SJI.

37. Also inconsistent with SJI's claimed control of La Star was SJI's lack of oversight in financial matters. Until the Commission designated a control issue against La Star, SJI had no participation in or supervision over La Star's finances. The joint venture agreement provided that USCC would pay all expenses for the prosecution of La Star's application and would be reimbursed out of the station's future revenues or external financings. SJI would have no liability until after grant of a construction permit. La Star Exh. 12, Att. B at 19. Accordingly, during the prosecution of La Star's application, USCC personnel handled all aspects of La Star's finances. Krohse issued checks for La Star expenses after they had been approved by Nelson. NOCGSA Reb. Exh. 9, Bates Nos. 169, 170. La Star's financial records were kept in Chicago, where USCC had its headquarters, and SJI received no copies. Tr. 967, 970.[18]

38. In some respects, USCC commingled La Star's business and its own. La Star expenses were assigned to the same account (#1306000) as some of USCC's own expenses. NOCGSA Reb. Exh. 25; tr. 1537-38, 1540. In at least one instance, an attorney from a firm retained by USCC (as opposed to La Star) requested payment of a La Star expense. NOCGSA Reb. Exh. 9, Bates No. 170; tr. 1539-40. That same attorney received a copy of a letter informing La Star's engineer of a change in invoice procedures. NOCGSA Reb. Exh. 24; tr. 1533.[19]

39. SJI, by contrast, received no documentation of La Star's expenses (Brady claimed that SJI was able to make an estimate of what they were based on oral statements Tr. 972-73, 1008). Despite the fact that USCC's expenses were to be reimbursed out of La Star's profits (including SJI's), SJI was unsuccessful on more than one occasion in obtaining an accounting from USCC -- although the joint venture agreement provided that an annual audit would be conducted. La Star Exh. 12, Att. B at 11; tr. 973, 1008-09, 1186-87.[20]

40. In summary, the record fails to substantiate La Star's bald claim that SJI retained control over basic policy decisions in the prosecution of La Star's application. Rather, to all appearances, USCC controlled the applicant. In view of SJI's passivity, there is no force to La Star's argument that the record does not disclose any instances in which USCC coerced SJI. The record shows no need for coercion. The record fully supports the conclusion that La Star is not controlled by SJI, the wireline-eligible carrier, and that therefore its application should be dismissed.

V. ORDERING CLAUSES

41. ACCORDINGLY, IT IS ORDERED,That the Supplemental Motion to Strike filed January 10, 1992 by La Star Cellular Telephone Company IS DENIED.[21]

42. IT IS FURTHER ORDERED, That the Exceptions to Initial Decision of Administrative Law Judge Joseph Chachkin filed December 26, 19991 by La Star Cellular Telephone Company, and the Exceptions of United States Cellular Corporation filed December 26, 1991 ARE DENIED; that the application of La Star Cellular Telephone Company (File No. 27161-CL-P-83) IS DISMISSED with prejudice; and that the applications of New Orleans CGSA, Inc. (File Nos. 29010-CL-P-83, 29181-CL-P-85) ARE GRANTED.

43. IT IS FURTHER ORDERED, That the Motion for Declaratory Ruling Seeking to Terminate Hearing Controversy, and the Motion for Stay, filed November 5, 1991 by La Star Cellular Telephone Company, the Exceptions of NOCGSA to Initial Decision filed December 26, 1991, and the Motion to Strike filed January 6, 1992 by La Star Cellular Telephone Company ARE DISMISSED as moot.

44. IT IS FURTHER ORDERED, That the Petition for Leave to File Minor Amendment filed January 27, 1992 by Louisiana CGSA, Inc. IS GRANTED, and the associated amendment IS ACCEPTED,[22] and the Motion to Strike and the Motion to Dismiss filed February 10, 1992 by United States Cellular Corporation, the Motion to Strike filed February 27, 1992 by United States Cellular Corporation, and the Petition for Reconsideration filed March 17, 1992 by United States Cellular Corporation ARE DISMISSED as unauthorized.[23]

45. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The ALJ also made contingent findings on the comparative merits of the La Star and NOCGSA proposals and preferred NOCGSA. In light of the ALJ's dismissal of La Star, these findings are moot.

[2] Now before the Commission are: (1) a Motion for Declaratory Ruling Seeking to Terminate Hearing Controversy filed November 5, 1991 by La Star, and oppositions filed November 15, 1991 by the Common Carrier Bureau and November 20, 1991 by NOCGSA; (2) a Motion for Stay filed November 5, 1991 by La Star, and oppositions filed November 12, 1991 by NOCGSA and the Bureau; (3) Exceptions to Initial Decision of Administrative Law Judge Joseph Chachkin filed December 26, 1991 by La Star, and Exceptions of United States Cellular Corporation filed December 26, 1991, and replies filed January 6, 1992 by NOCGSA and the Bureau; (4) a Supplemental Motion to Strike [NOCGSA's reply] filed January 10, 1992 by La Star; (5) Exceptions of NOCGSA to Initial Decision filed December 26, 1991, and replies filed January 6, 1992 by La Star and USCC; (6) a Motion to Strike [NOCGSA's exceptions] filed January 6, 1992 by La Star; (7) a Petition to File Minor Amendment filed January 27, 1992 by Louisiana CGSA, Inc. (LCI) [NOCGSA's successor-in-interest]; (8) a Motion to Strike [LCI's amendment] and a Motion to Dismiss [NOCGSA's application] filed February 10, 1992 by USCC, and an opposition filed February 24, 1992 by LCI; and (9) a motion to strike [a petition for leave to amend granted by FCC 92I-013 (Mar. 13, 1992)] filed February 27, 1992 by USCC and an opposition filed March 10, 1992 by LCI, and (10) a Petition for Reconsideration [of FCC 92I-013] filed March 17, 1992 by USCC, an opposition filed March 31, 1992 by LCI, and a reply filed April 1, 1992 by USCC.

[3] Because our conclusion in this regard results in the dismissal of La Star's application, we do not reach the question raised in NOCGSA's exceptions of whether La Star's principals lacked candor in their hearing testimony concerning the control of La Star. NOCGSA's exceptions and La Star's motion to strike those exceptions will be dismissed as moot. Questions regarding the conduct of SJI and USCC in this case may be revisited in light of the relevant findings and conclusions here in future proceedings where the other interests of these parties have decisional significance. *See Character Qualifications*, 102 FCC 2d 1179, 1223-24 ¶ 92 (1986), *recon. denied*, 1 FCC Rcd 421 (1986).

[4] Because La Star is ineligible to receive a grant in this proceeding, its contention that the Commission should terminate this hearing and conduct a lottery between NOCGSA and La Star is moot. La Star's motion to this effect and its related stay motion will be dismissed.

[5] AMPS was a subsidiary of South Central Bell Telephone Company, which provided wireline service to New Orleans. After the AT&T divestiture, AMPS' cellular interests in the region were transferred to BellSouth Corporation. 6 FCC Rcd at 6861 ¶ 10, 6890 n.8.

[6] Prior to the USCC acquisition, the management committee met only once, about six months before the USCC acquisition. 6 FCC Rcd at 6865-66 ¶ 54.

[7] Additionally, La Star sought to amend its application to modify the provisions of the joint venture agreement that the Commission cited in designating an issue against La Star.

[8] USCC was permited to intervene in this proceeding as a party by *La Star Cellular Telephone Co.*, 6 FCC Rcd 1245 (1991).

[9] The parties claim that the Commission has previously approved provisions of this nature. In any event, the parties assert that they ultimately modified the provisions.

[10] La Star argues that, under 47 C.F.R. § 22.902(b), it does not have to be wireline eligible because NOCGSA filed an expansion application and not an initial application in the MSA. We disagree. In specifying the duration of the wireline set-aside, we provided that it would remain in effect until after licensees had an opportunity to file fill-in applications, as NOCGSA has done. *Amendment of the Commission's Rules*, 4 FCC Rcd 5377, 5380-81 ¶ 24 (1989). In any event, the wireline set-aside was clearly in effect when La Star originally filed its application. *See Cellular Radio Service (Lottery Selection)*, 55 RR 2d 823, 824 ¶ 3 (1984) (the wireline set-aside was originally scheduled to expire April 8, 1984). The set-aside pertains to application eligibility and thus to the acceptability of La Star's application. *Cellular Communications Systems*, 93 FCC 2d 683, 692 ¶ 24 (1983). *See also James F. Rill (Communications Industries-PacTel Transfer)*, 60 RR 2d 583, 593 ¶ 32 (1986) (purpose of the set-aside is satisfied by the issuance of construction permits to eligible parties).

[11] We therefore do not reach La Star's exceptions dealing with the comparative aspects of this case. In particular, we need not address La Star's contention that the Commission erred by permitting NOCGSA to amend its CGSA to upgrade its coverage. La Star also argues that acceptance of such a major amendment should have resulted in dismissal of NOCGSA's application. This argument, however, was correctly rejected in the hearing designation order. *La Star Cellular Telephone Co.*, 5 FCC Rcd 3286, 3287 ¶ 9 (1990).

[12] In any event, the wording of the issue designated -- "whether SJI maintains control over the decisions of La Star" -- is broad enough to encompass both past and present actions.

[13] Thus, the criteria set forth in *Intermountain Microwave*, 24 RR 983, 984 (1963), which refer to the control of an operating facility, have less relevance here than in some other cases. *Compare Brian L. O'Neill*, 6 FCC Rcd 2572, 2574-76 ¶¶ 25-31 (1991) (applying the *Intermountain* criteria to the alleged premature transfer of control of an operating system).

[14] Additionally, in *Southwest Texas*, the licensee was a noncommercial broadcaster and therefore totally reliant on grants for financial support. 85 FCC 2d at 716. This factor minimized the significance of the financial participation of the licensee's delegate. More generally, as here, control of finances is a powerful and effective method of control of any business. *See Cornbelt Broadcasting Corp.*, 15 FCC 2d 315, 316 ¶ 5 (1968).

[15] La Star's joint venture agreement provides that management committee meetings be held at least once quarterly and may be by telephone conference call. The agreement further provides that minutes of the meeting be transmitted to each member of the management committee. La Star Exh. 12, Att. B at 8. SJI did not enforce any of these provisions. Tr. 1078-79.

[16] Official notice taken of docket sheets in D.C. Circuit cases 85-1322 and 85-1332.

[17] Brady described only one policy decision in which he was directly involved, claiming to have insisted on the six-cell design in La Star's application. La Star Exh. 12 at 12. On cross examination, however, Brady was unable to provide a credible explanation for his purported insistence, since he abandoned his initial testimony that the design was based on a population study and admitted that the six-cell plan provided coverage of some areas with very small populations and thus little prospective demand. Tr. 886-90. Additionally, we find no significance to Brady's claim that he participated in settlement negotiations with NOCGSA. La Star Exh. 12 at 13, 15-16. This establishes no more than that La Star held out to others that SJI was the controlling party. The internal relationship between SJI and USCC disclosed by the record tells a different story.

[18] Similarly, USCC had blanket authority to prepare La Star's tax returns. USCC did so, using its own Chicago address as La Star's. NOCGSA Reb. Exh. 9, Bates Nos. 289-90; tr. 1176-77.

[19] As part of La Star's direct case, Brady stated that he "negotiated with two banks and TDS [USCC's parent company] concerning financing" in connection with La Star's 1987 amendment. However, TDS' chief financial officer, Murray L. Swanson, Jr. (who executed TDS' financial commitment to La Star) recalled that the commitment was a standard TDS arrangment made without negotiation. NOCGSA Reb. Exh. 9, Att. Fat 14. *See* NOCGSA Reb. Exh. 9, letters following Bates No. 307.

[20] Only after the Commission designated a control issue against La Star -- and the parties were on clear notice that their practices were under scrutiny -- did the parties change their financial procedures. They amended the joint venture agreement to provide that SJI would pay a *pro rata* share of prosecution expenses. La Star Exh. 12, Att. C at 6; tr. 1013-14. The parties also assert that USCC will not be reimbursed for the expenses it had already incurred. Tr. 1013-14, 1193. La Star's books are now kept in La Rose, where SJI has its headquarters, and SJI pays La Star's expenses. Tr. 967, 971. Moreover, the record reflects direct communications between SJI and USCC after this time. NOCGSA Reb. Exh. 9, Bates Nos. 286, 297, 304. As discussed above, we see no justification for giving significant weight to these belated measures, made in the face of Commission scrutiny.

[21] La Star complains that NOCGSA's reply to La Star's exceptions incorporates by reference numerous paragraphs from NOCGSA's proposed findings and reply findings, and, thereby, in effect, exceeds the page limitations for replies to exceptions. We have examined NOCGSA's reply concerning the dispositive issue here and find that NOCGSA has cited its findings only in collateral respects. Thus, NOCGSA has not impermissibly incorporated these findings.

[22] The amendment reports the *pro forma* merger of NOCGSA into LCI, another subsidiary of BellSouth Corporation, without any change in beneficial ownership or of officers and directors. In view of the *pro forma* nature of the change, we find no sigificance in the fact that the amendment was executed by LCI rather than NOCGSA, the original applicant. *See* 47 C.F.R. § 1.743 (requiring amendments to be signed by an officer or duly authorized employee of a corporate *applicant). Cf. Folkways Broadcasting Co., Inc.*, 42 RR 2d 159, 162 ¶¶ 10-11 (1978) (accepting the substitution of a corporate applicant's 100 percent voting stockholder for the corporation as *pro forma). American Cellular Network Corp. of Nevada*, 63 RR 2d 1311, 1313-14 ¶¶ 8-9 (1987), does not hold to the contrary. There, the Commission rejected an attempt by a partnership formed through a settlement to substitute itself for the original applicant after that applicant had repudiated the settlement and refused to execute an amendment. That case did not involve an attempt to report a pro form a change in the identity of the original applicant, as is the case here. LCI's second amendment, reporting a minor change in its organization, is acceptable for the reasons stated in FCC 92I-013, which we hereby reaffirm. USCC's motion to strike this amendment and to reconsider the order accepting the amendment are premised on its earlier objection to LCI's substitution for NOCGSA, which we reject.

[23] USCC was permitted to intervene in this proceeding for the limited purpose of participating in the litigation of the control issue. 6 FCC Rcd at 1245-46 ¶ 5. The motions before us are, therefore, beyond the scope of the participation authorized.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-92-115

For Authority Pursuant to Section 214 of the Communications Act of 1934, as amended to Permit Use of Leased Transponders to Establish Communication with Certain Earth Stations in Canada and Mexico

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: June 5, 1992; Released: June 15, 1992

By the Chief, International Facilities Division:

1. The Commission has before it an application filed by American Telephone and Telegraph Company (AT&T) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to modify authorizations for the use of domestic satellite transponders which AT&T currently leases from GE American Communications, Inc. (GE Americom) to communicate with earth stations in Canada and Mexico. The application was placed on public notice. No comments were received.

2. AT&T is an international common carrier currently authorized to provide a range of interstate and international telecommunications services. AT&T presently leases four Ku-band transponders from GE Americom's K-2 satellite.[1] AT&T states that at this time, it uses these leased transponders establish additional channels of communications between earth stations in the United States. The instant application seeks to broaden AT&T's authorizations to include service to Canada and Mexico.

3. AT&T asserts that the expansion of its services to Canada and Mexico will benefit major corporations in that the services the corporations receive in the United States through the leased satellite capacity will also be available at the corporate locations in Canada and Mexico. Also, AT&T states that Canadian and Mexican customers could establish point-to-point communications to United States locations. AT&T further contends that currently, the only available alternatives are either a combination of terrestrial and Canadian satellite facilities, or an entirely terrestrial system. Both approaches, according to AT&T, are very expensive. AT&T also argues that a customer with a United States system and ancillary locations in either Canada or Mexico would have to maintain two networks; if there are locations in all three countries, the customer would have to manage three networks. Finally, AT&T contends that modifying its existing authorizations to permit communications with Canadian and Mexican earth stations will improve the productivity and competitiveness of the customers and foster international trade.

4. The Commission has previously recognized that the extension of existing or planned domestic networks to provide services between the United States and Canada and Mexico using U.S. domestic satellites is consistent with the Commission's Transborder policy.[2] In such cases we have determined that use of the INTELSAT system would be both clearly uneconomical and impractical.[3] Based on the circumstances presented in AT&T's application, we find that the same considerations are applicable here.

5. Upon consideration of the application and in view of the foregoing, we find that a grant of authority would serve the the public interest, convenience and necessity.

6. Accordingly, IT IS ORDERED that the application of AT&T (File No. I-T-C-92-115) IS GRANTED, and AT&T is authorized to use its four (4) Ku-band transponders leased from GE Americom to establish communications with certain earth stations in Canada and Mexico for the provision of private line services, consistent with existing consultations under Article XIV(d) of the INTELSAT Agreement.

7. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of their execution.

8. IT IS FURTHER ORDERED that this authority will be used to serve Canadian and Mexican locations solely for the provision of AT&T's tariffed private line services, pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61.

9. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not dispense with any requirements that may be imposed by other countries involved.

10. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Specifically, the Commission authorized AT&T to lease the following GE Americom's transponders: transponder Nos. 14 and 16, File No. W-P-C-5710 (released Mar. 12, 1986); transponder No. 10, File No. W-P-C-6374 (Mar. 8, 1989); and transponder No. 15, File No. W-P-C-6749 (released Sept. 18, 1991).

[2] *See* Transborder Satellite Video Services, 88 F.C.C. 2d 258, 280 (1981) (*Transborder I*) (Duplication of services over INTELSAT would involve terrestrial links or multi-hop satellite connections, increase costs and result in an inefficient use of the available radio spectrum).

[3] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FOX COMMUNICATIONS CORPORATION,
Complainant,

v. File No. E-91-103

MCI TELECOMMUNICATIONS CORPORATION,
Defendant.

ORDER

Adopted: June 5, 1992; Released: June 16, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 20, 1991, Fox Communications Corporation ("Fox") filed with the Commission the above-captioned formal complaint against MCI Telecommunications Corporation ("MCI" or the "Defendant"). The complaint alleged that MCI had violated Sections 201(a), 201(b), 202(a), 203(c), and 205(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201(a), 201(b), 202(a), 203(c), and 205(a).[1] In accordance with Commission rules governing formal complaint proceedings, the Defendant filed an answer denying the allegations and a counterclaim alleging that Fox wrongfully refused to pay MCI for tariffed telecommunications services provided by MCI.

2. Fox and MCI have conducted discussions aimed at settling the complaint and the counterclaim. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On May 29, 1992, and June 2, 1992, MCI and Fox filed motions seeking dismissal of the complaint and counterclaim with prejudice. We are satisfied that dismissal of the complaint and counterclaim will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the parties' motions to dismiss the complaint ARE GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] The complaint was filed with the Commission as a result of a referral by the United States District Court, Western District of Washington, Seattle Division, Case No. C90-14390 (December 26, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sierra Telephone Company, Inc.
Cascade Utilities, Inc., and
The Volcano Telephone Company

Petitions for Waiver of Part 69

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 1992; Released: June 16, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Sierra Telephone Company, Inc. (Sierra), Cascade Utilities, Inc. (Cascade), and the Volcano Telephone Company (Volcano) have filed petitions for waivers of Part 69 of the Commission's Rules, 47 C.F.R. § 69.1 *et seq.*, to permit them to tariff operator services under the existing local switching access rate element and to assign all related costs to that element.[1] Four parties filed comments and seven parties filed reply comments.[2] For the reasons set out below, we deny these petitions.

2. Petitioners are local exchange carriers (LECs) providing operator services as well as access services primarily to AT&T in their respective areas of California and Oregon. With regard to "O+" and "O-" inter-LATA calls transferred to AT&T, petitioners have each, until recently, provided operator services to AT&T on those calls under separate contracts. However, each contract has now expired and, in the case of Cascade, AT&T has ceased providing compensation for these operator services.[3]

II. PLEADINGS

A. Sierra, Cascade, and Volcano Petitions

3. Petitioners seek waivers of Section 69.4(b) of the Commission's Rules, 47 C.F.R. § 69.4(b), to enable them to bill all interexchange carriers (IXCs) with access to their service areas for the operator services that petitioners currently provide in those areas.[4] *See, e.g.*, Cascade Petition at 1. Petitioners seek this billing mechanism, first, to preserve their local operator services since their expired AT&T operator service contracts may not be renewed. *Id.* at 5-9. Second, petitioners want compensation from these IXCs for the use that the IXC's customers make of the petitioners' operator services. *Id.* at 9-10. Specifically, petitioners seek compensation for such local operator services as emergency assistance, after hour repair crew dispatch, and alarm monitoring. *Id.* at 7-8; Volcano Petition at 8-10. Services used by IXC customers, for which petitioners also seek compensation, include long distance dialing instructions, area code information, and "800" and "900" assistance. *See, e.g.*, Cascade Petition at 6-9. Petitioners also seek to recover the costs of inward assistance including busy line - interruption service. *Id.* at 9. Petitioners contend such waivers would be consistent with recent Bureau Orders and with the Commission's initial assignment of operator services to the access category. *Id.* at 2-5. Should the Commission deny these petitions, petitioners contend their local rates may increase, essential emergency services may become unavailable, and some of petitioners' employees may lose their jobs. *Id.* at 6 n.10, 8-9.

B. Comments

4. AT&T maintains that the waivers are unnecessary, insofar as they concern operator transfer and line status services provided to IXCs because the Commission previously granted a blanket waiver for such services in the *Ameritech Order*.[5] AT&T Comments at 1, 5-6. AT&T contends that petitioners' additional requests to recover through interstate access tariffs the costs of local services and certain unregulated services provided by their operators are unjustified and should be denied. *Id.* at 2, 6. AT&T maintains that the Commission has never authorized the recovery of local operator costs through interstate access charges. *Id.* at 3. It observes that the "Operator Assistance Element" initially included in the Part 69 rules was eliminated after divestiture when the personnel and

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[1] Sierra Telephone Company, Inc., Petition for Waiver of Part 69 of the Commission's Rules, filed May 8, 1991; Cascade Utilites, Inc., Petition for Waiver of Part 69 of the Commission's Rules, filed April 19, 1991; Volcano Telephone Company, Petition for Waiver of Part 69 of the Commission's Rules, filed May 24, 1991. As the two subsequent petitions generally duplicate the Cascade petition, we cite to the Cascade petition when referring to their common elements.

[2] On July 12, 1991, the following parties filed comments: American Telephone and Telegraph Company (AT&T), Frederick & Warinner (F&W), Interstate Telephone Company (Interstate), and the Organization for the Protection and Advancement of Small Telephone Comapnies (OPASTCO). On July 19, 1991, petitioners, AT&T, F&W, the United States Telephone Association (USTA), and Whidbey Telephone Company (Whidbey) filed reply comments. In addition, on June 26, 1991, The Concord Telephone Company filed remarks in support of the petitioners.

[3] In November 1991, AT&T filed a petition to compel Cascade to cease providing operator services on "O+" interLATA traffic and, instead, to route such traffic directly to AT&T. *See* AT&T Petition for Declaratory Ruling, filed November 15, 1991.

[4] Petitioners specifically ask the Bureau to waive Part 69.4(b), 47 C.F.R. § 69.4(b), as well as portions of subparts B, D, and E (including Sections 69.106, 69.306(b), and 69.404, 47 C.F.R. §§ 69.106, 69.306(b), and 69.404). *See, e.g.*, Cascade Petition at 1. *See also* Petitioners' Reply at 8.

[5] Ameritech Operating Companies, Petition for Waiver of Section 69.4(b), Memorandum Opinion and Order, 6 FCC Rcd 1541 (Com.Car.Bur. 1991) (*Ameritech Order*). "Operator transfer service" is provided when a LEC operator receives a "O-" call and transfers that call directly to the IXC requested by the caller. "Line status services" include "busy line - verification" (confirming a line is "busy" and not out of order) and "busy line - interruption" (emergency interruption of a "busy" line).

facilities used to provide call completion and assistance services were assigned to AT&T, and the Commission concluded that there was no need to include operator assistance services among such functions. *Id.* at 4. Since 1987, AT&T observes, the Commission has issued a series of Part 69 waivers only for specific access services providing direct assistance by LEC operators to IXCs. *Id.* at 4-5.

5. AT&T contends that under these Part 69 waivers, the Bureau has only permitted LECs to tariff two operator services in the access category -- operator transfer and line status services -- because, like the earlier "Operator Assistance Element," each of these services involves the provision of direct assistance in connecting callers to subscribing IXCs. Accordingly, to the extent petitioners seek compensation for these two services, AT&T contends their petitions are unnecessary. *Id.* at 1, 5-6. AT&T also argues that the Commission should reject petitioners' claims of hardship on local ratepayers just as the Commission did in response to a similar waiver request from the Benton Ridge Telephone Company.[6]

6. F&W contends that it is not feasible for a smaller LEC to establish a separate rate element for operator services such as the transfer of a "0-" call to an IXC. F&W Reply at 7. *Accord* USTA Reply at 2. F&W and Whitbey support billing these services on the basis of each IXC's total access minutes because IXC customer use of these operator services is likely proportional to each IXC's total minutes. *See* F&W Reply at 6 and Whitbey Reply at 5-7. *But see* AT&T Comments at 5-6, n. *** (contending that the per call rate structure contemplated by the *Ameritech Order* assures that IXCs are appropriately charged only for the operator access services that they actually use).

7. While their waiver petitions emphasize the need to preserve local operator services, petitioners' joint reply comments deny that they seek to recover the costs of any local operator services through interstate access tariffs, but only to collect reasonable access charges that will allow petitioners to recover those costs which are properly allocable to the interstate jurisdiction. Petitioners' Reply at 2. *Accord* Whitbey Reply at 9-10 and F&W Reply at 2. Petitioners also claim that the waivers granted in the *Ameritech Order* and in other Commission Orders are not sufficient to recover those costs because petitioners provide many incidental interexchange operator services not covered by those waivers and because they also provide services in many cases where a specific IXC beneficiary cannot be identified. Petitioners' Reply at 5-6. *Accord* F&W Reply at 4-5. *But see* AT&T Reply at 3 (contending that waiver granted in the *Ameritech Order* was explicitly conditioned on the establishment of a separate elements for these services). Petitioners also claim that the *Benton Ridge Order* is not applicable to their waiver requests because, unlike Benton Ridge, they are not seeking to recover all costs in question from the interstate jurisdiction. Petitioners' Reply at 5.

III. DISCUSSION

8. In March 1991 the Bureau released the *Ameritech Order* in which we granted a blanket waiver allowing LECs to recover the costs of two limited groups of operator services -- operator transfer and line status services -- under the access category rather than the interexchange category.[7] We conditioned that blanket waiver on the satisfaction of two conditions: first, that LECs must create separate Part 69 operator service access elements for these services and, second, that all costs associated with provision of these services must be allocated to those operator service elements. Thus, to the extent that they provide either of these two services, petitioners can use the blanket waiver granted in the *Ameritech Order* to recover those costs on a per call basis from any IXC that directly benefits from these services. Essentially, petitioners ask the Bureau to expand the blanket waiver granted in the *Ameritech Order* to accommodate their asserted need for a different mechanism to recover the costs of various other operator services that they provide. We find no reason to do so on the record before us.

9. First, the costs of petitioners' local operator services, no matter how valuable those services may be to local subscribers, cannot be recovered through petitioners' interstate access rates. Second, the costs of petitioners' incidental interexchange operator services do not involve direct assistance to a particular IXC and, therefore, are not attributable to a particular IXC. As such, these costs are properly attributed to petitioners' overhead and recovered through the separations process from both the intrastate and the interstate jurisdictions.

IV. ORDERING CLAUSE

10. ACCORDINGLY, IT IS ORDERED that the petitions for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69.1 *et seq.*, filed by Sierra Telephone Company, Inc., Cascade Utilities, Inc., and the Volcano Telephone Company ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[6] *See* Benton Ridge Telephone Company Petition for Waiver, Memorandum Opinion and Order, 6 FCC Rcd 1615 (1991) (*Benton Ridge Order*) (granting a oneyear delay in equal access requirements and denying a permanent waiver).

[7] *See Ameritech Order*, 6 FCC Rcd at 1541.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-2
Phase I

In the Matter of

Filing and Review of
Open Network Architecture Plans

ORDER

Adopted: June 2, 1992; Released: June 16, 1992

By the Commission:

1. In the *BOC ONA Order*,[1] the Commission established, pursuant to Section 410(b) of the Communications Act,[2] the Federal-State Joint Conference (Joint Conference) on Open Network Architecture (ONA) as an ongoing forum for state and federal cooperation on implementation of ONA.[3] The Commission stated that federal/state cooperation on ONA matters should be encouraged and formalized in a flexible forum recognizing different legitimate state/federal spheres of authority on ONA matters, and based on the principle that coordination and cooperation among the states, and between the Commission and the states, can encourage the successful development and implementation of ONA.

2. The current sunset date of the Joint Conference is June 30, 1992.[4] At its March 2, 1992, meeting the Federal-State Joint Conference determined that the Joint Conference should continue to serve for an additional period as a forum for federal-state cooperation on implementation of ONA. The Joint Conference recommended to the Commission that the sunset date be extended to June 30, 1994. The Joint Conference additionally adopted a staff report on tariff uniformity that recommended that the Joint Conference pursue uniformity guidelines in the areas of tariff structure, terms and conditions, and cost methodology.

3. We believe that the Joint Conference can continue to serve the purpose for which it was established in the *BOC ONA Order*. Extension of the sunset date also will permit continuation of the development of uniformity guidelines as recommended in the staff report. Accordingly, we will extend the sunset date of the Joint Conference until June 30, 1994.

4. Accordingly, IT IS ORDERED, that the sunset date for the Federal-State Joint Conference IS EXTENDED until June 30, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1,110, paras. 214-223 (1989) (*BOC ONA Order*), *recon.*, 5 FCC Rcd 3084 (1990)(*BOC ONA Reconsideration*), *BOC ONA Amendment Order*, 5 FCC Rcd 3102, *pets. for recon. pending, pets. for rev. pending*, California v. FCC, (9th Cir. No. 90-70336, filed July 5, 1990).

[2] 47 U.S.C. § 410(b).

[3] On May 4, 1989, the Joint Conference was expanded to include one additional federal Commissioner and six additional state Commissioners. Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 4017 (1989). The Commission increased state membership on the Joint Conference from seven to thirteen members at the request of NARUC. The Order also provided that we would appoint members from the state commissions in consultation with the National Association of Regulatory Utility Commissioners (NARUC).

[4] The Joint Conference had an initial sunset date of June 30, 1990. At the Joint Conference meeting in March 1990 in Washington, D.C., state and federal commissioners recommended to the Commission that the sunset date be extended to June 30, 1992. The Commission extended the sunset date until June 30, 1992, as recommended by the Joint Conference in the *Joint Conference Order*, 5 FCC Rcd 2731.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION
SERVICES, INC.,
Complainant,

v. File No. E-89-38

US WEST, INC., and ITS OPERATING
SUBSIDIARIES,
Defendants.

ORDER

Adopted: June 8, 1992; Released: June 16, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Allnet Communication Services, Inc. (Allnet) may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that Allnet presents against the defendant local exchange carriers (LECs)[1] is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant case parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of this complaint proceeding will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

III. CONTENTIONS OF THE PARTIES

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Allnet's damage claims rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's

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[1] The subject complaint was filed against U S West, Inc and its operating subsidiaries Mountain States Telephone and Telegraph Company, (MTN) Northwestern Bell Telephone Company (NWB) and Pacific Northwest Bell Telephone Company (PNB). U S West, Inc. filed consolidated pleadings on behalf of MTN, NWB and PNB. For the sake of convenience and clarity, we will refer to the defendants collectively as U S West.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order), recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order), appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[4] The complainants relied, as does Allnet in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order)* and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[6] Complainant and defendants, should they choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

prescribed rate of return, plus interest on that amount. In addition, Allnet has propounded interrogatories to the defendants that ask for "a complete rate of return analysis for U S West (including its holding company)... employing standard accounting methods approved by the FCC..." The interrogatories also request defendants to provide a complete rate of return analysis for each switched and special access rate element contained in the defendants' interstate access tariffs. The defendants have filed objections to the interrogatory requests. Allnet, in turn, has filed a motion to compel.

5. The defendants also raise a number of threshold challenges to the complainant's damage claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. The defendants argue that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[8] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rate of return was below the authorized level.[9]

6. Defendants also advance a number of arguments in opposition to complainant's discovery requests. U S West states that the rate of return analysis for the U S West holding company requested by Allnet does not exist since the holding company does not provide regulated services. Further, U S West contends, the U S West companies do not collect rate of return information for each switched and special access rate element in the detailed format that Allnet requests. U S West argues that they should not, in any event, be required to create information which is not developed in the ordinary course of business. According to U S West, the rate of return information requested for MTN, NWB and PNB is contained in the Form 492 prepared by the defendants and submitted to the Commission, copies of which were attached to the defendants' responses to Allnet's interrogatories.

7. In reply, Allnet asserts that U S West must compute its rate of return at the holding company level since U S West has maintained throughout the various rate of return complaint proceedings that a finding of unlawful overearnings should be based upon the overall earnings of U S West at the holding company level. Allnet argues that U S West's failure to provide information in its possession imposes an undue burden on Allnet to develop information necessary to a full resolution of the case.

IV. DISCUSSION

8. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Allnet may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Allnet, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 8 herein. We will, for example, consider any evidence submitted by the defendants that would tend to show that Allnet's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Allnet's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute Allnet's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

9. We will deny complainant's motion to compel in so far as it seeks rate of return information computed on an aggregate company-wide basis. The Commission has previously rejected U S West's contention that the relevant overall interstate rate of return is that of U S West in the aggregate, not each of its component operating companies.[10] For this reason, we find that Allnet's interrogatory requests, as propounded, are irrelevant to a proper determination of the damages Allnet seeks in this proceeding. We will, however, consistent with the guidelines set

[8] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[9] Additionally, U S West contends that the relevant overall interstate rate of return is that of U S West in the aggregate, not each of its component operating companies. The Commission previously addressed and rejected this argument. *See e.g., AT&T Liability Order* 5 FCC Rcd at 146 and 148 (1990).

[10] In the *AT&T Liability Order*, the Commission stated that

> Under the Act, carriers have substantial flexibility in formulating rates. Indeed, our rules permit companies to choose the level of geographic aggregation for purposes of developing and tariffing their rates, as well as for reporting their earnings on such rates. NWB could have chosen to develop its rates together with its affiliated U S West Companies but did not exercise its option to do so. Hav-

forth herein, require defendants to make available to the complainant information necessary to compute on an individual operating company basis, the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return.

V. CONCLUSION

10. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 8 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[11]

VI. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that complainant's Motion to Compel IS GRANTED to the extent indicated herein and otherwise, IS DENIED. Within 10 days of the release date of this order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 8 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

12. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 8 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

13. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ing chosen to file rates specifically tailored to its own revenue requirement, and thereby choosing to subject itself to a separate rate of return constraint, NWB cannot now be permitted to evade that constraint and force its customers to bear the burden of unlawful rates.

5 FCC Rcd 148 (footnotes omitted) (1990).

[11] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-124

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-8001
FM Broadcast Stations.
(Dunsmuir, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 29, 1992; Released: June 16, 1992

Comment Date: August 7, 1992
Reply Comment Date: August 24, 1992

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Fatima Response, Inc. ("petitioner"), permittee of Channel 261A, Dunsmuir, California, requesting the substitution of Channel 261C3 for Channel 261A at Dunsmuir, and modification of the construction permit (BPH-910408MA) to specify operation on the higher-powered channel.[1] Petitioner stated its intention to apply for Channel 261C3 if allotted to Dunsmuir.

2. We believe the petitioner's proposal warrants consideration since it could provide the community with an expanded coverage area FM service. Channel 261C3 can be allotted to Dunsmuir at the petitioner's currently authorized site,[2] in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

3. The petitioner's modification request at Dunsmuir conforms with the provisions of Section 1.420(g) of the Commission's Rules, and therefore, we shall propose to modify the permit for Channel 261A (BPH-910408MA) without entertaining competing expressions of interest in the use of Channel 261C3 at Dunsmuir, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

City	Channel No. Present	Proposed
Dunsmuir, California	261A	261C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 7, 1992,** and reply comments on or before **August 24, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Kimberly M. Thompson
President, Board of Directors
Fatima Response, Inc.
2044 Beverly Plaza
Suite #281
Long Beach, CA 90815

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

[1] Although petitioner's request was signed and its address given, it failed to include an affidavit verifying that the statements contained in its petition are accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for proposed Channel 261C3 at Dunsmuir are 41-17-20 and 122-14-25.

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-49

In the Matter of

Amendment of Section 73.202(b),	RM-7599
Table of Allotments,	RM-7732
FM Broadcast Stations.	
(Lomira, Sheboygan and	
Sheboygan Falls, Wisconsin)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 22, 1992; Released: June 16, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 1395 (1991), issued in response to a petition filed by WKTS, Inc. ("petitioner"), requesting the allotment of Channel 229A to Sheboygan Falls, Wisconsin, as that community's first local transmission service. Petitioner filed comments reaffirming its interest in Channel 229A at Sheboygan Falls.[2] Value Radio Corporation ("Value"), filed a counterproposal.[3] Sheboygan County Broadcasters Co., Inc. ("Sheboygan County"), filed comments. Value and Independence Broadcasting Wisconsin Corporation ("Independence") filed reply comments. Sheboygan County filed a petition for leave to file reply comments and reply comments. After the close of the comment period, Value, Sheboygan County and petitioner filed joint settlement comments and request for resolution of rule making.[4]

2. Value, permittee of Station WFDL(FM), Lomira, Wisconsin, counterproposed the substitution of Channel 249A for Channel 294A at Lomira. Value states that it has been unable to locate a site that meets both FCC and FAA requirements for the use of its construction permit for Channel 294A. According to Value, Channel 249A will provide city grade coverage to the community, meet FAA requirements and allow for prompt commencement of service to Lomira. To accommodate the substitution at Lomira, Value proposed the substitution of Channel 229A for Channel 249A at Sheboygan, Wisconsin, and modification of the license for Station WWJR(FM) to specify operation on Channel 229A. Value stated its willingness to reimburse Station WWJR for its reasonable expenses in changing channels. Value further proposes the allotment of Channel 294A in lieu of Channel 229A at Sheboygan Falls, Wisconsin.

3. Independence opposes the counterproposal filed by Value and requests that the Commission reject the proposal. According to Independence, Value has a transmitter site that appears to satisfy all FCC and FAA requirements and requires no change in the FM Table of Allotments.

4. Sheboygan County opposes the modification of its license for Station WWJR(FM), stating that it will suffer economic injury by the loss of its position on the dial. Sheboygan County states that it has promoted itself and become known by "FM98." The use of "FM98" is of critical importance to the station's revenues in the highly competitive Sheboygan market, which is served by twelve Milwaukee stations. Sheboygan County argues that the proposal is advanced solely to suit the private interest of Value at the expense of the potential preclusion of a new FM service at Sheboygan and the enormous investment by Sheboygan County in promotion of its current channel over the years. Sheboygan County contends that Value selected the new site in an attempt to reach the larger community of Fond du Lac and not because of FAA problems. According to Sheboygan County, Value does have a site which will serve Lomira that has been approved by the FAA and the FCC and does not require other channel changes. Therefore, Sheboygan County urges the Commission to dismiss Value's counterproposal.

5. On April 8, 1992, Value and Sheboygan County filed a joint settlement agreement looking toward the resolution of this proceeding. Pursuant to that agreement, Sheboygan County has withdrawn its objection to a channel substitution at Sheboygan, and Value and Sheboygan County have agreed to the level of reimbursement due Sheboygan County for the change in frequency. Both parties believe that the proposed channel substitutions serve the public interest. The channel substitution at Lomira will permit commencement of a new service at Lomira and the channel substitutions will allow both the Lomira and Sheboygan stations to increase power from three to six kilowatts. Value and Sheboygan County indicate they will promptly file the application to implement the requested changes and construct their new facilities after grant of such application.[5] In view of the withdrawal of the Sheboygan proposal and the agreement between Value and Sheboygan County, no further analysis of the comments filed is necessary.

6. Based on the above information, we believe the public interest would be served by the substitution of Channel 249A for Channel 294A at Lomira, Wisconsin, and modification of the construction permit for Station WFDL(FM) and substitution of Channel 229A for Channel 249A at Sheboygan, Wisconsin, and modification of the license for

[1] The communities of Sheboygan and Lomira, Wisconsin have been added to the caption.

[2] WKTS, Inc., withdrew its petition to add Channel 229A to Sheboygan Falls, Wisconsin, on May 1, 1992. In accordance with Section 1.420(j) of the Commission's Rules, WKTS, Inc., provided a copy of the agreement between itself and Sheboygan County Broadcasting Co., Inc., stating it will be reimbursed only for the actual expenses incurred in connection with this matter.

[3] Public Notice of the counterproposal was given on June 9, 1991, Report No. 1847 (RM-7732).

[4] Because these supplemental comments provide a settlement agreement which resolves conflicting issues in this case, acceptance is in the public interest.

[5] Sheboygan County withdrew its objections to the substitution of channels at Sheboygan. In accordance with Section 1.420(j) of the Commission's Rules, Value and Sheboygan County filed a statement that Value will not pay any consideration to Sheboygan in excess of legitimate and prudent expenses regarding the change in frequency in conjunction with the withdrawal.

Station WWJR(FM). Channel 249A can be allotted to Lomira in compliance with the spacing requirements at Value's specified site.[6] In addition, we are modifying Value's construction permit for Station WFDL(FM), Lomira, Wisconsin, to specify operation on Channel 249A. To accommodate Channel 249A at Lomira, we will substitute Channel 229A for Channel 249A at Sheboygan, Wisconsin. The substitution can be accomplished at the existing site for Station WWJR(FM).[7] Because Sheboygan County has consented to the modification of its authorization no *Order to Show Cause* is necessary. Value has stated its willingness to reimburse the licensee of Station WWJR(FM) for the reasonable costs in changing frequency. We shall modify Sheboygan County's license for Station WWJR(FM), Sheboygan, Wisconsin, to specify operation on Channel 229A.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 31, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Lomira, Wisconsin	249A
Sheboygan, Wisconsin	229A

8. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the construction permit for Station WFDL(FM), Channel 294A, IS MODIFIED, to specify operation on Channel 249A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in permit BPH-870617MI except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with permit BPH-870617MI, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

9. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WWJR(FM), Channel 249A, Sheboygan, Wisconsin, IS MODIFIED to specify operation on Channel 229A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license BLH-5384 except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-5384 except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

10. IT IS FURTHER ORDERED, That the petition filed by WKTS, Inc. IS DISMISSED (RM-7599).

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[6] The coordinates for Channel 249A, Lomira, are 43-38-30 and 88-26-30.

[7] The coordinates for Channel 229A, Sheboygan, are 43-43-12 and 87-44-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-25

In the Matter of

Amendment of Section 73.202(b), RM-7905
Table of Allotments,
FM Broadcast Stations.
(Fort Bragg, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 21, 1992; Released: June 16, 1992

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 7 FCC Rcd 1413 (1992), issued in response to a petition for rule making filed by California Radio Partners ("petitioner"), licensee of Station KOZT(FM), Channel 237A, Fort Bragg, California, proposing the substitution of Channel 237B1 for Channel 237A and modification of its license accordingly to specify the higher powered channel. Petitioner filed supporting comments stating its intention to apply for Channel 237B1 if allotted to Fort Bragg, as requested.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 237B1 for Channel 237A at Fort Bragg since it could provide an enhanced FM service to the community. Therefore, pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of California Radio Partners for Station KOZT(FM), as requested. As stated in the *Notice*, Channel 237B1 can be allotted to Fort Bragg at the petitioner's currently authorized site[2] in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 31, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Fort Bragg, California	237B1, 244B[3] 253B1[4]

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of California Radio Partners (BLH-811223AI) for Station KOZT(FM), IS MODIFIED to specify operation on Channel 237B1 in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted**, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, California Radio Partners, licensee of Station KOZT(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Fort Bragg, California.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, petitioner's request, although signed, failed to include an affidavit verifying statements contained in its petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments, and has done so.

[2] Coordinates used for Channel 237B1 at Fort Bragg are 39-24-24 and 123-44-04.

[3] A proposal to substitute Channel 228B for Channel 244B at Fort Bragg is pending in MM Docket No. 92-86. *See* 7 FCC Rcd 2408 (1992).

[4] Channel 253B1 was substituted for Channel 253A at Fort Bragg in MM Docket No. 91-310. *See* 7 FCC Rcd 1998 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-21

In the Matter of

Amendment of Section 73.202(b), RM-7796
Table of Allotments,
FM Broadcast Stations.
(Cave City and Radcliff, Kentucky
and Santa Claus, Indiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 21, 1992; Released: June 16, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 1363 (1992), issued in response to a petition for rule making filed by W & B Broadcasting, Inc. ("petitioner"), proposing the substitution of Channel 278C3 for Channel 278A at Radcliff, Kentucky, and the modification of its construction permit for Station WUOX-FM to specify operation on the higher powered channel. In order to accomplish the upgrade at Radcliff, petitioner also requests changes in the reference coordinates for vacant but applied for Channel 279C3 at Cave City, Kentucky,[1] and for vacant but applied for Channel 277A at Santa Claus, Indiana. W & B filed supporting comments. No other comments were received.

2. The *Notice* requested the petitioner to provide reasonable assurance that transmitter sites conforming to the site restriction are available at Santa Claus, Indiana. Petitioner submitted engineering data demonstrating assurance with respect to one potential transmitter site, at coordinates 38-13-03 and 87-01-07. Petitioner states that a Class A station from this site will provide a signal in excess of 70 dBu to all of Santa Claus and meet the citygrade coverage requirements. Petitioner also submits a statement from the co executor of the estate of the deceased owner offering reasonable assurance for the use of this site.

3. We believe the public interest would be served by substituting Channel 278C3 for Channel 278A at Radcliff, Kentucky, in order to provide that community with a wide area FM broadcast service. Channel 278C3 can be allotted to Radcliff in compliance with the Commission's minimum distance separation requirements with a site restriction 15.0 kilometers (9.3 miles) west of the community.[2] We will also change the reference coordinates for Channel 277A at Santa Claus.[3] We will authorize a modification of petitioner's construction permit for Channel 278A, Radcliff, Kentucky, to specify operation on Channel 278C3 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 31, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Radcliff, Kentucky	278C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WUOX-FM, Channel 278A, Radcliff, Kentucky, IS MODIFIED, to specify operation on Channel 278C3 in lieu of Channel 278A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, W & B Broadcasting, Inc., permittee of Station WUOX-FM, Radcliff, Kentucky, is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

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[1] Newberry Broadcasting, Inc., licensee of Station WHHT(FM) was granted a construction permit (BPH-910920IB) on April 1, 1992, for Channel 279C3 at Cave City, Kentucky, at coordinates 36-57-34 and 86-00-08. These reference coordinates are not in conflict with W & B's proposal to upgrade Station WOUX-FM at Radcliff, Kentucky. Therefore, no substitution at Cave City is necessary.

[2] The coordinates for Channel 278C3 at Radcliff are North Latitude 37-50-34 and West Longitude 86-06-49.

[3] The reference coordinates for Channel 277A at Santa Claus will be changed from North Latitude 38-09-41 and West Longitude 86-58-47 to North Latitude 38-12-50 and West Longitude 87-00-50.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-76

In the Matter of

Amendment of Section 73.202(b), RM-7647
Table of Allotments,
FM Broadcast Stations.
(Reserve, Louisiana)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: May 21, 1992; Released: June 16, 1992

By the Chief, Policy and Rules Division:

1. Before the Commission is a petition for reconsideration filed by Lacombe Community Broadcasters, Inc. ("LCBI") of a *Report and Order*, 6 FCC Rcd 5069 (1991), which granted a petition filed by Virgie Hare du Treil, permittee of Station WADU(FM), Channel 235A, Reserve, Louisiana. The *Report and Order* substituted Channel 235C3 for Channel 235A at Reserve, Louisiana and modified Station WADU(FM)'s construction permit to specify operation on the higher powered channel.

2. Channel 235C3 was allotted to Reserve in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.0 kilometers (13.1 miles) to avoid short spacing to five of the six pending applications for Channel 234A, Lacombe, Louisiana.[1] The *Notice* stated that such a restriction would not eliminate the short spacing to one application for Channel 234A at Lacombe, filed by LCBI. The *Notice* was served on LCBI but no comments or opposition were received.

3. LCBI's petition for reconsideration states that it chose not to oppose or comment on the proceeding because it understood the short spacing between the application site and the Reserve upgrade site to be purely theoretical. LCBI states that it had received assurances from the Reserve permittee that the actual site would not create short spacing to its application. LCBI contends that it was only when the Reserve permittee declined to provide written assurances that there would be no short spacing that LCBI realized the need for the Commission's involvement. LCBI now contends that a change in its transmitter site would subject LCBI to potential risks such as FCC tenderability defects, FAA objections, local zoning problems and neighborhood objections. LCBI offers a site which is available for the Reserve upgrade which meets the Commission's minimum spacing requirements, provides for city grade coverage of Reserve and is not short-spaced to any of the pending applications for Lacombe.[2]

4. Since the filing of LCBI's petition for reconsideration, a construction permit for Channel 234A, Lacombe, Louisiana, has been issued to another party in a comparative hearing.[3] Therefore, LCBI's petition for reconsideration is now moot.

5. IT IS THEREFORE ORDERED, That the petition for reconsideration filed by Lacombe Community Broadcasters, Inc. IS DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] The pending applications for Channel 234A at Lacombe, Louisiana were designated for hearing in MM Docket No. 90-590, 6 FCC Rcd 57 (1991).

[2] Lacombe proposes changing the coordinates for Channel 235C3 at Reserve to North Latitude 29-58-29 and West Longitude 90-45-19.

[3] North Lake Radio, Inc. (BPH-890123MH) was granted a construction permit for Channel 234A, Lacombe, Louisiana, by *Memorandum Opinion and Order* released on March 25, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY, L.P.,
Complainant,

v.

INDIANA BELL TELEPHONE COMPANY, INC.,	File No. E-90-271
MICHIGAN BELL TELEPHONE COMPANY, and	File No. E-90-272
OHIO BELL TELEPHONE COMPANY,	File No. E-90-273

Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: June 8, 1992; Released: June 16, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Charter Network Company, L.P. (hereinafter "Charter") filed the above-captioned formal complaints against Indiana Bell Telephone Company, Michigan Bell Telephone Company and Ohio Bell Telephone Company (hereinafter the "Defendants") seeking recovery of damages for the Defendants' alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2. The parties to the above-captioned complaints have conducted discussions aimed at settling the complaints. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On June 3, 1992, the parties filed a joint motion seeking dismissal of the complaints. We are satisfied that dismissal of the the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaints IS GRANTED and that the proceedings ARE TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORPORATION,
Complainant,

v.

INDIANA BELL TELEPHONE COMPANY,	File No. E-90-324
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-325
OHIO BELL TELEPHONE COMPANY and	File No. E-90-326
WISCONSIN BELL, INC., Defendant.	File No. E-90-327

ORDER

Adopted: June 8, 1992; Released: June 16, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, LiTel TeleCommunications Corporation (hereinafter "LiTel") filed the above-captioned formal complaints against Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, Ohio Bell Telephone Company, and Wisconsin Bell, Inc. (hereinafter the "Defendants") seeking recovery of damages for Defendants' alleged overearnings on interstate access charges for the period January 1, 1987, through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2. The parties to the above-captioned complaints have conducted discussions aimed at settling the complaints. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On June 3, 1992, the parties filed a joint motion seeking dismissal of the complaints with prejudice. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaints IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and that the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Western Union International, Inc. Transmittal No. 1925
Revisions to Tariff F.C.C. No. 24

Graphnet, Inc. Transmittal Nos. 185 and 188
Revisions to Tariff F.C.C. No. 5

Applications for Review

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1992; Released: June 16, 1992

By the Commission:

I. INTRODUCTION

1. TRT/FTC Communications, Inc. (TRT/FTC) has filed separate applications for review of two Common Carrier Bureau Orders denying TRT/FTC's petitions to reject or suspend and investigate the above-referenced tariffs.[1] TRT/FTC requests the Commission either to reject the Graphnet, Inc. (Graphnet) and Western Union International (WUI) tariffs as patently unlawful, or to initiate an investigation into the lawfulness of the tariffs. In this Order, we affirm the Bureau's Orders denying TRT/FTC's petitions and deny both of its applications for review.

II. BACKGROUND

2. On July 18, 1990, WUI filed Transmittal No. 1925 to increase its rates for termination of telex calls on its network. TRT/FTC protested the increase, asserting that WUI possessed monopoly control over access to its subscriber terminals. TRT/FTC maintained that interconnected record carriers had no other alternative than to transfer WUI-addressed telex calls to WUI and pay whatever WUI demanded for the service. TRT/FTC also argued that the increase in telex termination rates would exceed the division payments that international record carriers receive from their foreign correspondents, precluding profitable handling of most inbound internetwork traffic from overseas points. Finally, TRT/TFC asserted that the increase was unjust and unreasonable and discriminatory in violation of Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a). The Bureau denied TRT/FTC's petition.

3. On January 17, 1991, Graphnet filed Transmittal Nos. 185 and 188 to increase its rates for terminating domestic and international telex calls. TRT/FTC contended that rejection or suspension of the tariff was required to prevent Graphnet from destroying the public benefits of the existing record carrier interconnection arrangements. It also argued that the rates violated Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). This petition was also denied by the Bureau.

4. TRT/FTC filed an application for review of the *WUI Order* on October 1, 1990, and an application for review of the *Graphnet Order* on April 1, 1991.[2] TRT/FTC makes nearly identical arguments in each petition, requesting that the Commission reject the carriers' rate increases as patently unlawful, or alternatively, initiate an investigation into their lawfulness. TRT/FTC's first contention is that because the Bureau's Orders did not appear to consider its arguments, the Commission must consider them upon review.[3] TRT/FTC's second contention is that the application of non-dominant carrier rules to telex arrangements is inappropriate. It argues that each telex carrier exercises monopoly control over its own network. Application for Review (*Graphnet Order*) at 4-5. It also asserts that the Bureau's failure to discourage escalating telex rates is inconsistent with Commission policy encouraging cost-based accounting rates. Application for Review (*WUI Order*) at 3-5; Application for Review (*Graphnet Order*) at 5-8.[4]

5. WUI filed its opposition to TRT/FTC's application for review on October 11, 1990. Graphnet filed its opposition to TRT/FTC's application for review on April 16, 1991. Countering TRT/FTC's charge that the Bureau did not consider TRT/FTC's arguments, WUI asserts that neither TRT/FTC's petition nor its application for review meets the requirements necessary to grant a petition to reject or suspend the tariff of a non-dominant carrier. WUI Opposition at 3, 7-8.[5] Graphnet argues that the Bureau should apply a consistent approach to tariffs filed by all telex carriers. Graphnet Opposition at 1-2. Both Graphnet and WUI contend that TRT/FTC incorrectly believes that the Bureau Orders contravene the Commission's international telecommunications policies. Graphnet argues that the thrust of the *Accounting Rates Order* is the downward adjustment of international message telephone service accounting rates, and that the beneficial effects on international settlements of lowered telex rates is questionable. *Id.*

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[1] Western Union International, Inc., Transmittal No. 1925, 5 FCC Rcd 5496 (Com.Car.Bur. 1990) (*WUI Order*); Graphnet, Inc., Transmittal Nos. 185 and 188, 6 FCC Rcd 1444 (Com.Car.Bur. 1991) (*Graphnet Order*). TRT/FTC's application for review of the *WUI Order* was filed on October 1, 1990, and its application for review of the *Graphnet Order* was filed on April 1, 1991.

[2] TRT/FTC reiterated the same arguments in its reply to WUI's opposition, filed October 22, 1990. It did not reply to the opposition filed by Graphnet.

[3] Application for Review (*WUI Order*) at 2-3; Application for Review (*Graphnet Order*) at 2-3. TRT/FTC asserts, for example, that the Bureau did not address its argument that the tariffs violate Sections 201(b) and 202(a) of the Communications Act. TRT/FTC incorporates the arguments from its previous petitions to reject or suspend the WUI and Graphnet tariffs.

[4] *Citing* Regulation of International Accounting Rates, Report and Order, 6 FCC Rcd 3552 (1991) (*Accounting Rates Order*), and the Record Carrier Competition Act of 1981 (RCCA), Section 222 of the Communications Act, 47 U.S.C. § 222 et. seq.

[5] WUI adds that its rates do not violate Section 201(b) or Section 202(a), but that compliance with TRT/FTC's request that connecting carriers receive preferred rates would violate those sections, since the same service would be subject to different rates, based not upon costs, but upon a third party's charges.

at 2-3.[6] WUI adds that, even if the *Accounting Rates Order* actually required that accounting rates and settlements for international communication services be cost-based, WUI's telex termination rates are based on its own practices and costs and would not violate the Order. It further argues that arrangements with foreign correspondents are irrelevant to the issue of legality of the proposed tariff revisions, since they do not affect WUI's cost structure. WUI Opposition at 4-5.

III. DISCUSSION

6. Tariffs filed by non-dominant carriers are subject to streamlined tariff review and are presumed lawful. *See* International Competitive Carrier Policies, CC Docket No. 85-107, 102 FCC 2d 812 (1985), *recon.*, 60 RR 2d 1435 (1986) (*International Competitive Carrier Decisions).* To overcome the presumption of lawfulness attached to such tariffs, the petitioner must demonstrate: (1) that there is a high probability the tariff would be found unlawful after investigation; (2) that the harm alleged to competition if the tariff were to take effect would be more substantial than the injury to the public if the tariff did not take effect; (3) that irreparable injury will result if the tariff filing is not suspended; and (4) that the suspension would not otherwise be contrary to the public interest. *See also* Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773(a)(ii).

7. TRT/FTC's argument that the non-dominant carrier rules do not apply to telex services is incorrect. In the *International Competitive Carrier Decisions,* we concluded that no carrier is dominant in the provision of non-IMTS services. Carriers such as TRT/FTC which provide, *e.g.*, telex, TWX, telegram and private line services to and from foreign markets are subject to the rules developed for non-dominant carriers.[7] To overcome the presumption of lawfulness attached to the Graphnet and WUI tariffs, TRT/FTC was required to file petitions that successfully meet all four prongs of the test described above. As to the first prong, however, TRT/FTC merely asserted that the tariffs violate certain provisions of the Communications Act, and did not explain how either tariff might be considered unlawful under those provisions after investigation. Furthermore, TRT/FTC did not address the second prong, nor is it likely that it could have done so successfully, as non-dominant carriers (who lack market power by definition) rarely would be in a position to affect competition adversely.[8] And, although TRT/FTC contended that it might sustain financial losses in its future handling of overseas traffic, it did not argue that it might incur irreparable injury if the rate increases became effective. Finally, TRT/FTC did not discuss how suspension of either tariff would affect the public interest.

8. Clearly, TRT/FTC's petitions against these tariffs did not make the four-pronged showing necessary for suspension of either the WUI or the Graphnet tariff, nor do its applications for review make such a showing now. As TRT/FTC failed to overcome the presumption of lawfulness attached to the tariffs filed by Graphnet and WUI, the Bureau was correct in denying TRT/FTC's petitions.

IV. CONCLUSION AND ORDERING CLAUSE

9. For the above reasons, the Commission affirms the Bureau's Graphnet and WUI Orders and denies the applications for review of the Orders filed by TRT/FTC.

10. Accordingly, IT IS ORDERED that the applications for review of the Bureau Orders regarding Western Union International, Inc., Transmittal No. 1925, and Graphnet, Inc., Transmittal Nos. 185 and 188, filed by TRT/FTC Communications, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[6] *Citing* Regulation of International Accounting Rates, Notice of Proposed Rulemaking, 5 FCC Rcd 4948, 4955 n. 38 (1990).

[7] *See International Competitive Carrier Decision*, 102 FCC 2d at 833, 843-44. Although TRT/FTC filed comments in that proceeding, it did not object to our proposals for streamlining the tariffs of non-dominant carriers.

[8] *See International Competitive Carrier Decision*, 102 FCC 2d at 829-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal
F.C.C. No. 6	Nos. 13 and 21

ERRATUM

Released: June 16, 1992

By the Chief, Common Carrier Bureau:

1. On May 22, 1992, the Bureau released an order in the above-captioned proceeding. The following material (page 2), was inadvertently omitted in the printing process:

"... Communications Contract Tariff F.C.C. No. 6, Transmittal No. 13, filed by Sprint Communications Company, ARE DENIED."

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-269

In re Applications of

DOROTHY O. SCHULZE and DEBORAH BRIGHAM, A General Partnership — File No. BPCT-850320KG

BLANCO COMMUNICATIONS LTD. — File No. BPCT-850320LC

For Construction Permit for New Television Station, Channel 52, Blanco, Texas

Appearances

A. Wray Fitch, III, Esq., on behalf of Blanco Communications, Ltd.; and *Donald E. Martin, Esq.*, on behalf of Dorothy O. Schulze and Deborah Brigham.

DECISION

Adopted: June 2, 1992; Released: June 15, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. Before the Board is the *Supplemental Initial Decision*, 6 FCC Rcd 7419 (1991) (S.I.D.), of Administrative Law Judge Walter C. Miller (ALJ), as well as Exceptions of Blanco Communications, Ltd. (BCL) and Partial Exceptions of Schulze and Brigham (SB).

BACKGROUND

2. On October 26, 1986, the ALJ released his *Initial Decision*, 1 FCC Rcd 120 (1986) (I.D.), in this proceeding. There, he denied BCL's and SB's applications and granted the application of then-applicant Opal Chadwell. In so doing, the ALJ concluded that both BCL and SB lacked the requisite character qualifications to be Commission licensees. More specifically, he found that SB principal, Dorothy O. Schulze, had made misrepresentations to, and lacked candor with, the Commission. He further found that BCL's principal, Sidney Paul DuBose, had also made misrepresentations to, and lacked candor with, the Commission. Conversely, the ALJ concluded that Opal Chadwell had not misrepresented facts to the Commission about the availability of her proposed transmitter site that she had specified in her original application. Thus, as the only basically qualified applicant, her application was granted.

3. Following oral argument before the Board, we found Chadwell's financial proposal deficient, and, as a result, issued *Memorandum Opinion and Order*, 2 FCC Rcd 2981 (Rev. Bd. 1987), seeking additional information. The Board thereafter affirmed the I.D. *Decision*, 2 FCC Rcd 5502 (Rev. Bd. 1987).

4. Responding to subsequent applications for review, the Commission remained troubled with Chadwell's financial showing. Thus, by *Order*, FCC 881-045 (released May 5, 1988), the Commission ordered Chadwell to produce additional financial data, and by *Memorandum Opinion and Order*, 4 FCC Rcd 1215 (1989) (*First Remand Order*), remanded this proceeding to the ALJ on the following issue:

> To determine whether Opal Chadwell has sufficient funds to meet her estimated costs of construction and operation.

In so doing, however, the Commission expressly declared that the denial of BCL's and SB's applications on character grounds was appropriate: "We see no basis on the present record developed under those issues to modify the conclusions of the ALJ and the Review Board . . . ." However, said the Commission, "we conclude that unresolved questions exist concerning Chadwell's financial qualifications." The Commission then went on to delineate several financial credibility questions that had been raised before it, and suggested that Chadwell may have falsely certified her financial qualifications, or that she may have lacked candor in her representations to the Commission. *See* S.I.D. at para. 4.

5. Pursuant to the Commission's remand, the ALJ issued a *Further Prehearing Order*, FCC 89M-422, released February 8, 1989. There, in addition to the financial issue, he specified a false financial certification issue and a misrepresentation/lack-of-candor issue against Chadwell "so that the Commission could get evidentiary answers to the questions raised by the remand order." S.I.D. at para. 5. The added issues were:

> To determine whether, when Opal Chadwell filed her application on January 3, 1985, she falsely certified her financial qualifications.
>
> To determine whether Opal Chadwell has submitted the sworn statements of T. F. Burger, Jr. and/or Georgia Dixon in bad faith or otherwise lacked candor in asserting the value of her assets.

6. In this *Order*, the ALJ also set out a procedural schedule for the remanded hearing. As part of that schedule, he directed that remanded discovery be initiated before March 10, 1989, and completed by May 10, 1989. However, in his S.I.D., the ALJ recounted the following events (*id.*, at paras. 8 - 17; footnotes omitted):

> On the March 10, 1989 initiation deadline both [SB] and BCL launched timely discovery. Each served motions for production of documents on Chadwell, and each signified that they would depose Opal Chadwell along with five other non-party individuals the Commission had mentioned in their remand order. The depositions were scheduled for April 25-26, 1989.

Mrs. Chadwell stonewalled discovery. She neither opposed nor commented on the deposition notices, and she neither opposed or commented on [SB's] and BCL's motion to produce. So, on March 31, 1989, the Trial Judge granted the unopposed production requests. *See* FCC 89M-1032 and FCC 89M-1033. He ordered Chadwell to produce the pertinent financial documents on or before April 10, 1989. She didn't.

Mrs. Chadwell also failed to show up for her April 25, 1989 deposition. But, in addition, she also contacted the other five non-party individuals . . . and told them that they didn't need to appear for the depositions. They didn't even though all of them had been legally subpoenaed.

Meanwhile on April 21, 1989, [SB] moved to have Chadwell compelled to produce the documents, and on April 25, 1989, BCL followed suit. Again Chadwell stonewalled. She neither opposed nor even commented on the motions to compel. Those motions were granted. *See* FCC 89M-1403 released May 10, 1989, and FCC 89M-1416 released May 11, 1989. Chadwell was ordered to produce the pertinent financial qualification documents before May 22, 1989. She didn't.

[SB] moved to dismiss Opal Chadwell's application for failure to prosecute. Again Chadwell stonewalled. She neither commented on nor opposed [SB's] motion. So on June 2, 1989, the Trial Judge dismissed Chadwell's application for Channel 52, Blanco, Texas. *See* FCC 89M-1568. And since [SB] and BCL had already been denied, and those denials had withstood appeal [Chadwell filed an Appeal some 18 months subsequent to her dismissal, but was denied reinstatement. *See* 6 FCC Rcd 4218 (1991)] . . . he returned Channel 52 in Blanco, Texas to the TV Processing Line. In that way other applicants could apply for the channel. [SB] and BCL sought reconsideration, and BCL argued strenuously that since the Trial Judge had dismissed Chadwell's application for failing to prosecute, no findings of fact or conclusions of law had been made on Chadwell's credibility and the questions that the Commission had raised in FCC 89-7 back on January 31, 1989 . . . had never been resolved.

The Commission remanded again, but this time on an even more limited basis. *See* FCC 90-197, released May 24, 1990 [5 FCC Rcd 3227 (1990) (*Second Remand Order)*]. They were apparently concerned with [SB's] and BCL's arguments that then recent non-record happenings had undermined Chadwell's credibility vis-a-vis BCL principal, Sidney Paul DuBose . . . . The Commission concluded " . . . that the question of whether or not recent events undermine Chadwell's credibility vis-a-vis DuBose should be referred to the ALJ. The ALJ heard the witnesses and is therefore in the best position to determine in the first instance whether recent events altered their credibility. In this regard Chadwell's failure to prosecute also occurred directly before the ALJ."

So, said the Commission, BCL " . . . has justified pursuing the matter of Chadwell's credibility to a limited extent." They noted that BCL hadn't had a chance to cross-examine Chadwell about possible financial misrepresentations and her abuse of process, and further noted that they did not " . . . think it fair to leave matters solely under Chadwell's control."

The Commission then specifically directed the Trial Judge: (1) to give BCL the opportunity to cross-examine Chadwell at hearing about her non-record financial showing and the reasons she failed to prosecute her application; (2) to let BCL depose Chadwell and other relevant witnesses; and (3) to let BCL subpoena relevant documents which could be introduced into evidence to impeach Chadwell's credibility.

Finally, the Commission specified that "[t]he ALJ should then issue a supplemental initial decision containing his findings and conclusions;" and that "[t]he supplemental initial decision will be subject to review by the Board, which, like the ALJ will have the advantage of its previous review of the record."

7. BCL notes in its Exceptions (at pps. 7-8) that it timely initiated discovery, and that both Opal and Earl Chadwell were subpoenaed to produce certain documents and attend depositions. However, BCL also observed that it "was forced to seek the aid of the Federal Court to enforce the subpoenas." The United States District Court, Western District of Texas, Austin Division issued a Show Cause Order; but on the eve of a hearing before that tribunal, the Chadwells agreed that Opal Chadwell would appear in Washington, D.C., on November 19, 1990, and that Earl Chadwell would agree to be deposed.

8. After hearing Chadwell's testimony, and setting forth extensive findings of fact concerning her financial qualifications (*see* S.I.D. at paras. 20-79), the ALJ ultimately concluded as follows (S.I.D. Conclusions at paras. 16-21):

So given the chance, BCL has been able to show that witness Opal Chadwell has made false and misleading financial misrepresentations to the Commission, and that she has abused the Commission's processes in an effort to cover up those misrepresentations.

It is time then to assess whether these more recent financial misrepresentations " . . . undermine Chadwell's credibility vis-a-vis [Sidney Paul] DuBose . . . " It is concluded that they do not. It is a *non sequitur* to assume that because Opal Chadwell misrepresentated her *financial* qualifications to the Commission during the administrative appellate process in 1988, she must have also lied about the availability of her *transmitter site* at the original hearings in 1985-1986. Nor is there any discernible nexus between the Trial Judge's original adverse demeanor findings on Sidney Paul DuBose (*See* [I.D.], FCC 86D-59 *supra*, at Findings 7-26 and Conclusions 5-12), and the record we have developed on witness Opal Chadwell at this second remand.

In [the I.D.], FCC 86D-59, the Trial Judge found and concluded that BCL principal Sidney Paul DuBose had made misrepresentations to and lacked candor with the Commission. These misrepresentations related to the availability or lack thereof of Opal Chadwell's original transmitter site.

The Review Broad affirmed those findings and conclusions. *See* 2 FCC Rcd 5502 (Rev. Bd. 1987).

The Commission then reviewed the DuBose findings and conclusions. They expressly stated that "We see no basis on the present record . . . to modify the conclusions of the ALJ and the Review Board . . . "

Nothing that has been developed at this remanded hearing impacts on the original DuBose findings and conclusions and the two affirmances of those findings and conclusions. The net result of this hearing is that (and assuming that Opal Chadwell were still an applicant) we now have three prevaricators instead of two. Stated another way, now *none* of the applicants and former applicants are fit to be a Commission licensee.

EXCEPTIONS

9. In its Exceptions, BCL now argues that, because of the adverse credibility findings against Opal Chadwell, reversal of the previous adverse findings and conclusions against BCL principal Sidney Paul DuBose on the site availability issue is mandated. BCL claims that the primary evidence against DuBose (leading to BCL's initial disqualification) was Opal Chadwell's testimony; thus, now that "Chadwell's credibility has been destroyed" (BCL Exceptions at p. 9), none of her initial testimony adverse to DuBose can be credited and the ALJ's affirmance of BCL's disqualification in the S.I.D. "summarily and with little or no analysis" (*id.*, at p. i) requires reversal.

10. For its part, SB simply argues that "the ALJ exceeded his authority" in ordering that SB's application "remains denied" (S.I.D. at para. 21), because SB's initial denial "has been stayed by the Commission and further action on SB's application is being held in abeyance. *Remand Order*, para. 10." As a result, SB claims, the Board should "vacate the ALJ's S.I.D. insofar as it purportedly addresses S & B's application." (SB Exceptions at p. 2).

DISCUSSION

11. *Adverse findings re*: *DuBose in Initial Decision*: It is appropriate to first recount the specific adverse findings concerning Sidney Paul DuBose made by the ALJ in his *Initial Decision* (I.D., at paras. 7-8, 10, 12-14, 16-20, 22-24; footnotes omitted):

[In a Petition to Enlarge Issues] BCL accused Chadwell of misrepresenting to the Commission that her original transmitter site was available to her when it wasn't. Chadwell replied that her original erroneous site specification was the combination of an innocent error and BCL principal Sidney Paul DuBose's duplicity. She claimed that DuBose had falsely led her to believe that he owned the land where she proposed her transmitter and that the land was available for her use.

DuBose denied that. He says he told Chadwell that he would make his land available to her if she included him as a partner in her application. Moreover, he says he never represented to her that he owned the land where she proposed to locate her original transmitter.

* * *

Having observed the demeanor of Mrs. Chadwell and Mr. DuBose, the Presiding Officer has selected Opal Chadwell's version of the facts . . . . She has factually detailed the events underlying the conflict. Her testimony is basically consistent and corroborated by her husband's sworn testimony. There is no reason for not crediting her version of the past events. On the other hand, the Presiding Officer wasn't favorably impressed with Sidney Paul DuBose's testimony. His answers didn't fit together. He was weak on details, and his sense of recall was incredibly poor (*See* Tr. 796, 797, 798-799, 802, 807, 809, 811, 815, 816, 819-820, 821-822, 823, 824-825, 833 and 834). In fact, at the hearing, once additional details about the Chadwell/DuBose meetings were brought out, the Presiding Officer got the distinct impression that DuBose was stringing Mrs. Chadwell along; *i.e.*, he was pretending to be favorably considering letting Mrs. Chadwell use what she thought was his land for a transmitter so he'd have time to prepare and file a competing application. But he knew all along that she had specified coordinates that wasn't his land.

* * *

Chadwell filed her Channel 52 application with the Commission on January 3, 1985. She specified a transmitter site at the coordinates she thought was owned by DuBose. After her application was filed she and Sidney DuBose continued to talk. But they were unable to agree on the terms of DuBose's participation. At this time DuBose knew that Chadwell's application specified transmitter land she believed he owned . . . .

* * *

Several days later her counsel told her that DuBose, Benjamin Franklin Pittman, and Gracia Romero (Celestino Romero's wife) had formed a limited partnership and had filed a competing application for Channel 52. Chadwell immediately contacted DuBose. She asked him, if even though he had filed a competing application, would he still allow her to use his land for a transmitter site. DuBose said he didn't know, he would have to ask his partner, Mr. Pittman, and get back to her. Several days passed. Chadwell tried to contact DuBose, but couldn't reach him. She left word for him to return her call. He never did.

* * *

After observing the demeanor of the testifying witnesses, and after hearing all the facts and circumstances surrounding the conflict, it is found that Opal Chadwell has been a truthful witness, while Sidney Paul DuBose has dissembled. Admittedly Mrs. Chadwell mistakenly specified an erroneous set of site coordinates; she specified coordinates for a

site she mistakenly thought was Mr. DuBose's land. DuBose knew early-on that Mrs. Chadwell had erred. But he let her believe she had specified his land, and he verbally assured her she could use that land. He deliberately led her on until he could get a competing applicant organized, and a competing application prepared and filed. Then, via a Motion to Enlarge, he tried to use Mrs. Chadwell's mistake against her.

So it is found that Sidney Paul DuBose lied when he swore that: ". . . I was not asked to provide a letter stating Ms. Chadwell could use my property. At no time did I indicate I would provide such letter, nor did I give oral assurance my property could be used . . . Ms. Chadwell did not point to a location on a map at her office and ask if a site was on my ranch and if she could use that site to construct a tower. I never, therefore affirmatively nodded that the site she allegedly pointed to on the map was located on my property or that Ms. Chadwell could use it . . . ."

It is further found that Sidney Paul DuBose lied when he swore that "[m]ore significantly, I never gave verbal affirmation that Ms. Chadwell could use my ranch for her tower. Ms. Chadwell never asked for, nor did I ever agree, to provide a letter indicating she could use my ranch . . . . At no time after Ms. Chadwell filed her application did I know that she had specified a site she thought was on my property . . . ."

12. *Actions on appeal*: As heretofore noted, the Board affirmed the ALJ based upon "our review of the entire record." We also agreed with the ALJ that the actions of DuBose were designed to "sandbag" Chadwell, and we refused to disturb the specific demeanor and credibility findings "with respect to DuBose and BCL . . . ." *Decision*, 2 FCC Rcd at 5504. Thereafter, considering pending applications for review and remanding this proceeding to the ALJ on the financial issue against Chadwell, the Commission noted (*First Remand Order*, 4 FCC Rcd at 1217):

> Similarly, as Blanco points out, other issues in this proceeding, concerning Chadwell's transmitter site, involve questions of Chadwell's credibility. We see no basis on the present record developed under those issues to modify the conclusions of the ALJ and the Review Board. However, if the record on remand indicates that Chadwell has falsely certified her financial qualifications or has lacked candor, this may reflect on her credibility under other issues and the ALJ might reconsider his findings if appropriate. Again, however, we emphasize that we are not prejudging this matter, but merely indicating that the ALJ has the discretion to act *if* circumstances warrant. Consequently, we reserve final judgment on these issues pending any further relevant action by the ALJ.

And, in a further remand in response to petitions for partial reconsideration, the Commission declared (*Second Remand Order*, 5 FCC Rcd at 3229):

> We believe that the question of whether or not recent events undermine Chadwell's credibility vis-a-vis DuBose should be referred to the ALJ. The ALJ heard the witnesses and is therefore in the best position to determine in the first instance whether recent events alter their credibility.

13. *BCL's Exceptions*: In addition to arguing that the ALJ "summarily and with little or no analysis" affirmed his previous disqualification of BCL, it essentially claims, without directly so stating, that Chadwell's testimony must result in the wholesale application of the maxim: *Falsus in uno, falsus in omnibus* (*i.e.*, he who speaks falsely on one point will speak falsely on all). However, the Commission has made clear that it would be error to disregard all of the testimony of a witness merely because of other questions of credibility. Rather, "such testimony should be evaluated and accorded the weight to which it is entitled in light of all the relevant facts and circumstances in the record, including the demeanor of the witness and any detracting evidence." *Star Stations of Indiana, Inc.*, 51 FCC 2d 95, 100 (1975); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1950); *see also Wigmore on Evidence*, Section 1008 at 982 (1970) (the maxim should be condemned as both worthless and pernicious).

14. Moreover, the ALJ here made demeanor and credibility findings in his I.D. concerning the specific testimony of DuBose (set forth in detail at para. 11, *supra*) (*e.g.*, DuBose's "answers didn't fit together. He was weak on details, and his sense of recall was incredibly poor . . . . In fact . . . once additional details . . . were brought out, the [ALJ] got the distinct impression that DuBose was stringing Mrs. Chadwell along . . . ."). Additionally, in his S.I.D. (Conclusions at paras. 16-21; *see* para. 8, *supra*), the ALJ specifically addressed whether or not Chadwell's misrepresentations at the second hearing " . . . undermine Chadwell's credibility vis-a-vis DuBose." The ALJ, recognizing that because Chadwell's credibility had been demolished as to her financial qualifications, nevertheless concluded that this finding did not mandate a conclusion that Chadwell lied about her transmitter site; indeed, the ALJ determined that there was no "discernible nexus between [his] original adverse demeanor findings on Sidney Paul DuBose . . . ", and specifically held that nothing in the second hearing was developed that "impacts on the original DuBose findings and conclusions . . . ." *Id.*

15. DuBose's own *actions* here (*e.g.*, he obviously knew of the availability of Channel 52 at Blanco and, at the last minute, formed his own group and applied for the frequency) alone buttress the ALJ's initial findings and conclusions. Coupled with the specific demeanor and credibility findings adverse to DuBose, based upon his own testimony, and our own review of the record (again), must result in our affirmance of the ALJ with respect to BCL. As iterated at length in our *Decision*, 2 FCC Rcd at 5504 (and cases cited therein) " . . . this Review Board is constrained to defer to the credibility findings of a presiding Commission [ALJ] in the absence of countervailing record evidence which would demonstrate reversible error in that ALJ's credibility determinations. *See, e.g., WEBR, Inc., v. FCC*, 420 F.2d 158, 162 (D.C. Cir. 1969)."

16. *SB's Exceptions*: SB argues that any action on its application has been stayed by the Commission in its *Second Remand Order*, 5 FCC Rcd at 3227- 3228. There, the Commission declared:

Schulze-Brigham contends that a recent action in another proceeding undermines the basis on which Schulze-Brigham was disqualified because it calls into question the validity of the presiding judge's evaluation of the credibility of key witnesses.

The ALJ in this proceeding heard testimony regarding the question of whether Schulze-Brigham's principal, Dorothy O. Schulze, misrepresented her role in this and other broadcast applications . . . . *Opal Chadwell*, 1 FCC Rcd 120, 126 ¶ 76, 130-31 ¶¶ 13-14 (I.D. 1986). In reaching this conclusion, the ALJ rejected the testimony not only of Schulze but also of JoAnn Garcia, an applicant for a new television station in Conroe, Texas. Garcia testified that she and Schulze were bona fide applicants in their respective communities. The ALJ concluded that Garcia too had been a front for Ozan and that her attempt to corroborate Schulze's version of events was "sheer fabrication" and "a web of lies." *Id.* at 124 ¶ 55, 126 ¶ 69. The Review Board and the Commission upheld the initial decision. *Opal Chadwell*, 2 FCC Rcd 5502 (Rev. Bd. 1987), *rev. denied*, 4 FCC Rcd 1215 (1989).

Subsequently, a second ALJ ruled on a real-party-in-interest issue against Garcia's application in the Conroe, Texas proceeding. *DLBS, Inc.*, 3 FCC Rcd 6710 (I.D. 1988). This issue involved the same material facts as the issue in Blanco except that it was centered on Garcia's application (that of G-A Communications, Inc.) rather than Schulze-Brigham's Blanco application. The Conroe ALJ resolved this issue favorably to Garcia, finding that Ozan was not the real-party-in-interest. He also found that Garcia's testimony was "believable, essentially uncontradicted, and is credited here." *Id.* at 6721 ¶¶ 142-43.

Schulze-Brigham contends that the findings of the Conroe ALJ cast doubt on the reliability of the Blanco ALJ's credibility findings and urges the Commission to reconsider its reliance on these findings. Meanwhile, however, additional events have transpired, in that the Conroe proceeding was appealed to the Board. The Board considered the need to reconcile the disparate findings made in the Blanco and Conroe proceedings. It concluded that the most appropriate course of action would be to remand the Conroe proceeding so that the Conroe ALJ could explicitly consider the veracity of Garcia's testimony in the Blanco proceeding. *Imagists*, 4 FCC Rcd 3749, 3751-52 ¶¶ 9-13 (Rev. Bd. 1989). The Board indicated that it would give customary deference to the Conroe ALJ's credibility findings even if they differ from those of the Blanco ALJ. *Id.* at 3751 ¶ 12. Pursuant to the Board's directive, the Conroe ALJ has conducted hearings and will issue a supplemental initial decision in due course.

In view of Schulze-Brigham's contentions, it may become necessary for the Commission to examine the discrepancy between the findings made in the Blanco and Conroe cases. The Board's action, however, makes it premature for the Commission to address questions regarding Garcia's testimony at this time. In order to preserve the status quo if it should become necessary to reexamine this matter, we will, on our own motion, stay our previous memorandum opinion and order to the extent that it denies Schulze-Brigham's application until such time as the Board issues a decision in the Conroe proceeding regarding Garcia's veracity. Additionally, we will hold Schulze-Brigham's petition in abeyance during that period. After the Board issues a decision in the Conroe proceeding, Schulze-Brigham may supplement its petition to bring its arguments up-to-date. We will then have the two proceedings before us simultaneously, and we can then take whatever action appears appropriate.

17. In our remand order in *Imagists*, 4 FCC Rcd 3749 (Rev. Bd. 1989), the Board specified the following issue:

> [9]. To determine whether JoAnn Garcia lied to, misrepresented facts to, or lacked candor with the Commission in the Blanco, Texas comparative television (Channel 52) proceeding (MM Docket No. 85-269). *Opal Chadwell*, 1 FCC Rcd 120 (ALJ 1986) (*Initial Decision*), 2 FCC Rcd 5502 (Rev. Bd. 1987), (*Decision*), *on review*, 65 RR 2d (1498 (1989); and, if so, the effect thereof on the basic qualifications of G-A Communications, Inc. to be a Commission licensee.

In his *Supplemental Initial Decision*, 6 FCC Rcd 2963 (1991), in the Conroe proceeding, the ALJ concluded that JoAnn Garcia misrepresented facts to the Commission and that G-A was unqualified to be a Commission licensee. Thereafter, in our *Decision*, 6 FCC Rcd 3440 (Rev. Bd. 1991), we affirmed the ALJ in this regard, and applications for review were filed with the Commission on January 17, 1992. These applications remain pending before the Commission; thus, we will withhold further action on SB's application in this proceeding in accordance with the directives set forth in the Commission's *Second Remand Order*, 5 FCC Rcd at 3228 ¶ 10.

18. ACCORDINGLY, IT IS ORDERED, That the application of Blanco Communications Ltd. (File No. BPCT-850320LC) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-250

In re Applications of

GLOBAL INFORMATION TECHNOLOGIES, INC.	File No. BPCT-861219KG
TEXSTAR COMMUNICATIONS, LTD.	File No. BPCT-870212KM
FRONTIER BROADCASTING, INC.	File No. BPCT-870212KN
FREDERICKSBURG CHANNEL 2	File No. BPCT-870212KP
HAL S. WIDSTEN	File No. BPCT-870212KT
STONEWALL BROADCASTING, INC.	File No. BPCT-870212KU

For Construction Permit for
New Television Station, Channel 2,
Fredericksburg, Texas

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1992; Released: June 15, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. Before the Review Board are exceptions to the *Initial Decision*, 4 FCC Rcd 5445 (1989) (*I.D.*), of Administrative Law Judge Edward Luton (ALJ) and to the *Supplemental Initial Decision*, 6 FCC Rcd 6912 (1991) (*S.I.D.*). The subject of these long-running proceedings is the construction permit for a new television station in Fredericksburg, Texas. The ALJ awarded the permit to Stonewall Broadcasting, Inc. (Stonewall), although he recognized that three of its competitors, TexStar Communications, Ltd., Fredericksburg Channel 2, and Hal S. Widsten, proposed superior coverage to populations residing in underserved areas. *I.D.*, ¶¶124-25. These three applicants were duly accorded moderate to substantial preferences over Stonewall for proposed coverage. *I.D.*, ¶149. Stonewall nevertheless was found to prevail on the strength of its integration proposal. *I.D.*, ¶ 152.

2. The record in this case indicates that *all* of the parties before us propose some degree of coverage to underserved areas. It is thus evident that comparative coverage is an important component to the ultimate comparative evaluation of the qualified applicants. A significant coverage advantage may potentially outweigh preferences received under the integration and diversification factors. *See, e.g., Christian Broadcasting of the Midlands, Inc.*, 99 FCC 2d 578, 584 (Rev. Bd. 1984), *review denied*, 103 FCC 2d 375 (1986), *recon. denied*, 2 FCC Rcd 6404 (1987); *FBC, Inc.*, 95 FCC 2d 256, 258-62 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 976 (Rev. Bd. 1984), *review denied*, FCC 85-309, released June 14, 1985.

3. In accordance with then-existing precedent, the joint engineering exhibit submitted into the record in the instant proceeding excluded from its computations the signals of any noncommercial television stations in determining the underserved areas and populations proposed to be served by the Fredericksburg applicants. However, the Commission subsequently modified that practice in *Channel 32 Broadcasting Co.*, 6 FCC Rcd 5188 (1991), *recon. dismissed*, 7 FCC Rcd 1694 (1992), where it stated that the signals of noncommercial television stations would no longer be exempt from consideration under the comparative coverage issue. In light of this policy change, further consideration of this proceeding requires that the parties supplement their joint engineering exhibit to demonstrate the effects, if any, of existing noncommercial educational television service on the areas and populations analysis under the comparative coverage issue. *See WCVQ, Inc.*, 6 FCC Rcd 7209 (Rev. Bd. 1991). The parties should also take this opportunity to correct any errors in the joint engineering exhibit previously submitted. *See* Reply Exceptions of the Mass Media Bureau, filed September 1, 1989.

4. The parties are directed to file their joint supplement within 20 days of the release of this order. In the event that the parties are unable to reach a joint stipulation, each party may file a status report on such date indicating its respective position and the Mass Media Bureau should comment on these positions no later than ten days thereafter. The applicants are further directed to comment on the extent to which any comparative coverage preferences may be warranted on the basis of the requested information, and the impact such preferences shall have, if any, on the comparative posture of this case.

5. ACCORDINGLY, IT IS ORDERED, That the parties ARE DIRECTED to file a submission in accordance with paragraphs three and four above.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-123

In the Matter of

Amendment of Section 73.202(b), RM-7992
Table of Allotments,
FM Broadcast Stations.
(Mexico, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 29, 1992; Released: June 16, 1992

Comment Date: August 7, 1992
Reply Comment Date: August 24, 1992

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Renard Communications Corp. ("petitioner") requesting the allotment of Channel 280A to Mexico, New York, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 280A to Mexico, since it could provide the community with its first local aural transmission service. Channel 280A can be allotted to Mexico without the imposition of a site restriction.[2] We recognize that this allotment would be short-spaced to Station CHXL-FM, Channel 279B, Brockville, Ontario, and Station CBBP-FM, Channel 280B, Peterboro, Ontario, Canada. However, we have determined that a station can limit its power in the direction of these stations and avoid any prohibited interference. Therefore, since Mexico is located within 320 kilometers (200 miles) of the U.S.-Canadian border, we will request concurrence in the allocation of Channel 280A to Mexico as a specially negotiated allotment.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Mexico, New York	--	280A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 7, 1992,** and reply comments on or before **August 24, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Craig L. Fox, President
Renard Communications Corp.
4853 Manor Hill Drive
Syracuse, New York 13215-1336
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

---

[1] Section 1.52 of the Commission's Rules requires that a petitioner sign and verify all petitions and pleadings unless represented by legal counsel. While the petitioner did sign the petition, it failed to include a verification statement. Petitioner is therefore requested to do so in comments herein. Failure to comply with Section 1.52 of the Rules can result in the dismissal of its request.

[2] The coordinates for Channel 280A at Mexico are North Latitude 43-27-34 and West Longitude 76-13-45.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RADIO LOMPOC LIMITED PARTNERSHIP — File No. BPH-900516MS

For Construction Permit
for a New Station on Channel 285A
in Lompoc, California

MEMORANDUM OPINION AND ORDER

Adopted: May 29, 1992 **Released: June 17, 1992**

By the Commission:

1. The Commission has under consideration an application for review filed on August 23, 1991 by Radio Lompoc Limited Partnership ("RLLP"). John Walton Smith, Jr. d/b/a NOE-WAL Broadcasting ("Smith") filed an opposition to the Application for Review, to which RLLP replied. By way of background, RLLP's application for a construction permit for a new commercial FM station in Lompoc, California, was returned by the Commission staff as not sufficient for tender, because it lacked a full scale transmitter site map.[1] *See Letter from the Chief, FM Branch, Audio Services Division,* September 18, 1990 (reference 8920-F. Hodge). Subsequently, on October 18, 1990, RLLP submitted an amendment containing a full scale site map and a petition for reconsideration. The reconsideration request was denied in the context of a Mass Media Bureau ("Bureau") *Hearing Designation Order* (*"HDO"*), which set for comparative hearing the four remaining applicants for this Lompoc allotment. *See Lion's Share Broadcasting,* 6 FCC Rcd 4465 (1991).

2. RLLP argued in its petition for reconsideration that: (1) the deficiency in its application is more analogous to incorrect, as opposed to missing, information and that its site map was merely incorrect as to form; (2) terrain obstructions could be observed from the reduced scale map; (3) information as to nearby communications facilities not shown on its map is provided elsewhere in its application; and (4) its proposed site elevation could be obtained from the site maps of other mutually exclusive applications. Alternatively, RLLP argued that since *Appendix D* to the *Report and Order* (*"Appendix D"*) did not clearly distinguish between tenderability and acceptability defects, its curative amendment should be accepted, citing *Rochelle C. Salzer v. FCC,* 778 F.2d 869 (D.C. Cir. 1985).

3. In rejecting the above arguments and denying the petition, the Bureau noted that RLLP's application, lacking the full-scale site map required by the *Public Notice,*[2] was not substantially complete pursuant to the Commission's "hard look" processing rules, and stated the rationale for adopting such strict rules: to deal expeditiously with the "influx of thousands of applications for new allotments." 6 FCC Rcd at 4465. The Bureau also noted, alternatively, that RLLP's map submission, a photocopy of a full scale map reduced to a "regular size page," was too imprecise to allow the staff to verify the engineering data. Consequently, the Bureau concluded, it was not possible to ascertain the geographic coordinates and ground elevation of the proposed transmitter site "confidently and reliably drawing on the application as a whole." *Id.* at 4465-66.

4. In its application for review, RLLP argues that the hard look policy, as applied, lacks both clarity and consistency and that there are "substantial questions" as to whether treatment of the instant deficiency as a tenderability defect violates its right to clear notice and consistent treatment, referencing *Salzer* and *Melody Music, Inc. v. FCC,* 345 F.2d 730 (D.C. Cir. 1965). RLLP notes that a conflict between site coordinates depicted on a map and as denoted elsewhere in an application constitutes an acceptability defect, citing *Steven B. Courts,* 4 FCC Rcd 4764 (1989). RLLP argues that, had it committed a substantive error, as did Courts, by plotting its transmitter site erroneously, it would have been permitted to submit a

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[1] In order to be deemed tenderable pursuant to the FM "hard look" processing standards instituted by the Commission in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985) (*"Report and Order"*), all commercial FM applications must include a transmitter site map meeting requirements set forth in an April 5, 1985 *Public Notice* (*"Public Notice"*). The requirement that applicants submit a full scale map, or portion thereof, is set forth in the *Public Notice. See* 51 Fed. Reg. 45,945 (December 23, 1986).

[2] The *Public Notice* states, in pertinent part:

> In order to allow the Commission's processing staff to verify the correctness of the geographic coordinates provided in an application, it is necessary for this site map to show along the printed margin of both axes at least two coordinates markings, specifically labeled by the USGS, one on either side of the marked site. Additionally, a scale of kilometers or miles (kilometers, if available) and all of the identifying map information must be included. *The site should be plotted on a full scale map,* and all of the contour lines should be clearly visible. Faded, smudged or otherwise illegible maps are unacceptable. Photocopies are acceptable in lieu of actual USGS Maps, provided they are clear, dark and legible. It is not necessary to submit an entire map (although this is perfectly acceptable), but only as much as necessary to fully comply with the requirements described above.
>
> In certain cases it may be inconvenient to provide a full scale photocopy which includes both the site and the margins. This can occur when the site lies towards the center of the map. In this case the following alternative is acceptable. Provide a *full scale* copy of the section of the map containing the site. This copy must include either four of the standard printed cross-marks or one margin and two cross-marks. Fine lines should be drawn between the marks in such a fashion as to enclose the site. Each of these lines should be labeled with the appropriate latitude or longitude. This *full scale* map section must include all the information specified in the previous paragraph. In addition, a reduced copy of the entire map must be included to allow the Commission's staff to verify that the lines have been correctly labeled.
>
> *If the above requirements are not met, the application will be returned without further review....*
>
> 51 Fed. Reg. at 45,945. (emphasis supplied)

curative amendment during the amendment as of right period. RLLP states that a policy permitting correction of an error of substance, such as a site plotting error, but not one of form, such as omission of a particular scale of map, cannot be justified. In this regard, RLLP states that equal treatment would not adversely affect expeditious application processing, since uncorrected errors would still result in dismissal at the acceptability stage. Additionally, RLLP argues that the Commission's "apparent" policy reflected in *Appendix D* limiting the resolution of errors to the four corners of the application itself has also been undermined by the Commission's practice of taking official notice of its licensing records when an applicant specifies the site of an existing licensee, referencing *Courts* and *Carta Corp.*, 3 FCC Rcd 798 (MM Bur. 1988). It argues that there is no justification for this "clear departure from the apparent policy" of the "hard look" processing rules, since there are situations where an applicant may intend to correct erroneous Commission engineering records. Application, at 6. RLLP also notes that the Bureau has in the past erroneously distinguished between a tenderability and an acceptability defect, citing *Courts*. Further, RLLP asserts, the *HDO* reflects additional Bureau uncertainty in that two other applications were found technically unacceptable due to violations of our technical acceptance criteria, yet curative amendments were allowed because the pertinent rule failed to give adequate notice of the requirement in question. RLLP contrasts this treatment to its own, stating that there was no reasoned attempt to square this disparate treatment. RLLP concludes that the test applied to it -- whether its site location could be determined confidently and reliably from the application as whole -- is "vague and subjective" and cannot meet the criteria of *Salzer* and *Melody*. *Id.*, at 7.

5. RLLP's application was properly returned. The Commission's "hard look" processing standards regarding tenderability of FM broadcast applications have always required the submission of a full scale site map or a portion thereof. *FM Transmitter Site Map Submissions*, 1 FCC Rcd at 381.[3] That policy has been consistently applied by the Commission and the staff since the initiation of these standards[4] and RLLP's application, because it lacked the requisite full scale map, is clearly untenderable. As we stated in *Appendix D*, after enumerating each of the approximately two dozen tenderability items necessary to begin processing:

> *If any of the above information is missing, the application will be returned as not sufficient for tender.* If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender....

50 Fed. Reg. at 19,946. (emphasis supplied) Thus, in *Appendix D*, the Commission specifically limited the policy of examining the four corners of an application to incorrect or inconsistent information.

6. However, even assuming *arguendo* that *Appendix D* requires that RLLP's reduced map be deemed "information... present but... visibly incorrect," we affirm the Bureau's alternative finding in that regard. The Bureau concluded that RLLP's map, having been reduced to a "regular size page," did not permit the staff to derive "confidently and reliably" the needed information, *i.e.*, highly accurate independent verification of the correctness of the site coordinates listed in the application. We require submission of a full scale map because the Commission desires *maximum* verification accuracy in determining transmitter site location. As the scale is reduced, the accuracy of any site verification study is correspondingly reduced. Viewed in this context, the requirement for a full scale map is not a matter of mere form, as RLLP contends. Rather, it substantively furthers the "hard look" processing system's goal of providing expeditious service while enhancing processing certainty and efficiency.

7. As RLLP correctly notes, the Commission's processing procedures do permit an applicant for a new facility to incorporate by reference certain engineering data contained in the Commission's records relating to an existing license. As we stated in *Courts:*

> Because the applicants clearly proposed to locate their antennae on existing towers to which specific reference was made in each application, the staff could, drawing on the applications as a whole and on Commission records for the licensed facilities, confidently and reliably verify [the requisite site information] in order to complete an acceptability study which verified each proposal's compliance with Commission rules. In particular, using the accepted coordinates for the existing towers, the staff could verify the exact locations of the proposed transmitter sites. Therefore, amendment of those applications was not essential to the processing of those applications for acceptability purposes. 4 FCC Rcd at 4766. Contrary to RLLP's assertion, the practice of allowing an applicant to incorporate by reference an existing licensed site does not "undermine" the "hard look" standards. In that situation, the critical coordinate information concerning that site has been previously verified as being in compliance with our processing requirements. In contrast, the ascertainment of RLLP's critical data from maps of competing applicants requires the staff to look beyond the four corners of RLLP's application to information that is not incorporated by reference and is not analogous to the policy of taking official notice of prior-licensed data within the Commission's official records. In effect, RLLP is arguing that the Commission should undertake to assemble for it a

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[3] In a recent Notice of Proposed Rule Making in MM Docket No. 91-347, we proposed to modify or eliminate the FM "hard look" processing rules, but stated that any such change would only apply to applications filed after the effective date of the rule changes. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265 (1991).

[4] *Apple Communications*, 7 FCC Rcd 1467 (1992); *Lamoille Broadcasting and Communications Limited Partnership*, 7 FCC Rcd 2700 (1992); *WCCR Broadcasting Limited Partnership*, 6 FCC Rcd 2554 (M. M. Bur. 1991).

composite application by piecing together sections from competing applications. Although an applicant specifying a prior-licensed site may intend to correct errors in Commission records, the Commission presumes the regularity of licensed facilities and, absent an indication that this presumption is incorrect, we believe it is appropriate to rely upon it.

8. RLLP further contends that the "hard look" policy as applied here lacks clarity and consistency in its treatment of similar deficiencies. RLLP references *Courts* to signify the confusion between whether its application was dismissed for a tenderability or acceptability defect. RLLP is correct in pointing out that in *Courts* the Commission indicated that conflicting geographic coordinates as denoted in a site map and as indicated elsewhere in an application constitute an acceptability and not a tenderability defect. 4 FCC Rcd at 4766, note 3. In this regard, the Bureau in *Courts* had erred in its initial characterization of the defect in question. However, it does not follow from that case that the Commission's tenderability criteria as set forth in *Appendix D* are insufficient in clarity. Here, RLLP's submission, lacking a full scale site map, clearly failed to comply with the *Public Notice* and thus made it impossible for the staff to perform a technical acceptability study. There is no confusion regarding the characterization of RLLP's defect. RLLP, unlike the applicant in *Courts,* failed to submit *any* map meeting the formal requirements for tenderability. Thus, *Courts* offers no support for RLLP's position. We have previously held that the *Report and Order* satisfied the notice requirement regarding the institution of the "hard look" processing standards. *See, e.g., Star Signal Corporation,* 1 FCC Rcd 450, 451 (1986). Accordingly, *Salzer* offers no support for RLLP's position.

9. Similarly, we reject RLLP's allegation of disparate treatment in the HDO resulting from the Bureau having permitted the engineering defects in two mutually exclusive applications to be corrected by untimely amendments. As the Bureau explained in the *HDO*, those defects related to deficiencies in contour overlap showings by the two applicants who utilized the provisions of 47 C.F.R. Section 73.215.[5] Those technical deficiencies ordinarily would have rendered the applications in question unacceptable for filing. However, unlike RLLP's situation, the wording of Section 73.215 of the rules does not afford applicants full and explicit notice of certain technical requirements necessary to avoid dismissal under the hard look policy. Thus, consistent with *Salzer*, those applicants were allowed to amend. 6 FCC Rcd at 4467. In contrast, *Appendix D*'s prerequisites are clear, and RLLP was afforded explicit notice. Since, as previously noted, RLLP has been treated as other similarly situated applicants failing to submit the requisite full scale site map, the Commission has not applied the same hard look processing standard arbitrarily or unfairly. *See New Orleans Channel 20, Inc.,* 830 F.2d. 361 (D.C. Cir 1987).[6]

10. Accordingly, for the foregoing reasons, IT IS ORDERED, that the Application for Review filed on August 23, 1991, by Radio Lompoc Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[5] Section 73.215 of the Commission's Rules permits the acceptance of applications proposing short-spaced antenna locations if they afford protection to the affected station.

[6] Although RLLP asserts, without citing supporting authority, that reduced scale maps have been found sufficient in other non-broadcast services, we have held that such practices are of no precedential value in the FM service, and that, in any event, cellular applications have been dismissed where a full scale map was not provided. *See Apple Communications,* 7 FCC Rcd at 1468.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-375

In re Applications of

FOX TELEVISION STATIONS, INC. File No. BRCT-880801LW

For Renewal of License of
Station KTTV(TV)
Los Angeles, California

and

RAINBOW BROADCASTING, INC. File No. BPCT-881101KH

For Construction Permit for a New
Commercial Television Station
in Los Angeles, California

Appearances

William S. Reyner, Richard S. Rodin, Mace J. Rosenstein, on behalf of Fox Television Stations Inc.; *Robert Lewis Thompson, Ellen S. Mandell, Howard J. Barr*, on behalf of Rainbow Broadcasting, Inc.; and *Norman Goldstein*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: June 2, 1992; Released: June 19, 1992

PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, 5 FCC Rcd 5255 (*HDO*), released August 22, 1990, the Chief, Video Services Division, designated for hearing the application of Fox Television Stations Inc. (Fox) for renewal of license of Station KTTV(TV), Los Angeles, California and the mutually exclusively application of Rainbow Broadcasting, Inc. (Rainbow) for construction permit for a new commercial television station to operate on the channel now utilized by KTTV(TV). The *HDO* specified the following issues:

> 1. To determine with respect to the bank commitment letter of Bank of America to Rainbow Broadcasting.
>
> a. the terms and conditions with respect to rate of interest and collateral, if any, for the proposed loans;
>
> b. the duration and terms and conditions for repayment of the loan;
>
> c. whether, in light of the evidence adduced pursuant to a and b above, the bank letter establishes a present firm intent to lend the necessary funds for construction;
>
> d. whether, in light of all the evidence adduced above, the applicant is financially qualified.
>
> 2. To determine with respect to Rainbow Broadcasting, Inc., whether there is a reasonable possibility that the tower height and location proposed by it would constitute a hazard to air navigation.
>
> 3. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 4. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

For purposes of determining Fox's entitlement to a renewal expectancy under the standard comparative issue, the Presiding Judge ruled that the relevant time period was March 6, 1986, when Fox became the licensee through November 30, 1988, the end of the license term. (Tr. 30, 33).

2. Prior to the hearing, Rainbow moved for summary decision of the air hazard issue specified against it. The motion was granted by *Memorandum Opinion and Order*, FCC 90M-3246, released October 16, 1990.

3. By *Order*, FCC 91M-1129, released March 16, 1991, the Presiding Judge designated the following issue against Rainbow:

> To determine whether Rainbow Broadcasting, Inc. is financially qualified.

4. In specifying this issue the Presiding Judge noted that it is contingent on resolution of the financial issue specified in the HDO which requires a determination as to whether Rainbow was financially qualified at the time it certified. The burden of proceeding and the burden of proof on this issue was placed upon Rainbow.

5. The Presiding Judge denied motions to enlarge the issues filed on September 26, 1990, by Rainbow against Fox and Fox against Rainbow, by *Memoranda Opinions and Orders*, FCC 90M-3815, released December 4, 1990, and FCC FCC 90M-4043, released December 21, 1990. A subsequent motion to enlarge issues filed by Fox against Rainbow on January 3, 1991, was dismissed by *Memorandum Opinion and Order*, FCC 91M-543, released February 11, 1991.

6. Prehearing conferences were held on October 26, 1990, and January 22, 1991, an admissions session on March 25, 1991, and hearing sessions on April 9-12, and May 10, 1991 in Washington, D.C. Additional hearing sessions were held on May 14-15, 1991 in Los Angeles, California. The record was closed on May 15, 1991. (Tr. 1518). Proposed findings of fact and conclusions of law were filed July 22, 1991; replies were filed August 19, 1991.

Findings Of Fact

Fox Television Stations Inc.

Description of the Applicant

7. Fox Television Stations Inc. (Fox) is a wholly-owned subsidiary of Twentieth Holdings Corporation (THC). The single majority voting stockholder of THC is Mr. K. Rupert Murdock, who holds 51 percent of the voting rights. Mr. Barry Diller holds 25 percent of the voting rights. Fox, Inc., holds 24 percent of the voting rights (Fox Ex. 1, pp. 1-2).

8. The officers and directors of Fox are as follows:

Name	Position
K. Rupert Murdock	Director
Barry Diller	Director/Chairman
Richard A. Sarazen	Director
Chase Carey	Senior Vice President
Dean Ferris	Senior Vice President
David Y. Handelman	Senior Vice President/ Secretary
John P. Meehan	Senior Vice President
Andrew G. Setos	Senior Vice President
Gerry Friedman	Vice President
Muriel Reis	Vice President
Earl J. Hammond	Vice President
Molly Pauker	Vice President
Michael M. Doodan	Assistant Secretary
Bonnie Bogin	Assistant Secretary
William Lockard	Assistant Secretary
David E. Miller	Assistant Treasurer

(Fox Ex. 1, p. 2).

9. The officers and directors of THC are as follows:

Name	Position
K. Rupert Murdock	Director
Barry Diller	Director/Chairman
Richard A. Sarazen	Director
Chase Carey	Senior Vice President
David Y. Handelman	Senior Vice President/ Secretary
John P. Meehan	Senior Vice President
Earl J. Hammond	Vice President
Michael M. Doodan	Assistant Secretary
David E. Miller	Assistant Treasurer

(Fox Ex. 1, pp. 2-3).

10. Fox acquired Television Station KTTV(TV), Channel 11, Los Angeles, California (KTTV), from Metromedia Radio & Television, Inc., on March 6, 1986 (Fox Ex. 1, p. 1).

Diversification

11. As part of the same transaction in which it acquired KTTV, Fox also acquired the following five television stations: WNYW-TV, New York, New York; KDAF-TV, Dallas, Texas; KRIV-TV, Houston, Texas; WTTG(TV), Washington, D.C.; and WFLD-TV, Chicago, Illinois. On April 18, 1990, Fox acquired KSTU(TV), Salt Lake City, Utah, from MWT Corp (Fox Ex. 1, p. 1).

12. On December 31, 1986, Fox's parent company, THC, acquired all the shares of WXNE-TV, Inc. (now WFXT, Inc.), the licensee of WXNE-TV (now WFXT(TV)), Boston, Massachusetts. The assets of WFXT, Inc. (including the FCC licenses) were assigned to Boston Celtics Broadcasting Limited Partnership (BCBLP) on May 11, 1990. As consideration for the sale of the assets, WFXT, Inc., received and continues to hold a debenture which, under certain circumstances, may be converted into partnership interests of BCBLP (Fox Ex. 1, p. 1).

13. The following daily newspapers are published by corporations in which certain officers and directors of Fox and THC have attributable interests: *The Boston Herald*, Boston, Massachusetts, and *San Antonio Express-News*, San Antonio, Texas. Other than the foregoing, Fox, and THC and its attributable principals, have no attributable media interests (Fox Ex. 1, p. 3).[1]

Integration

14. Fox does not claim any credit for the integration of ownership into management of KTTV (Integration and Diversification Statement of Fox Television Stations Inc., dated November 9, 1990, at 3).

Fox's Past Performance Record -- Renewal Expectancy

Renewal Period

15. The relevant period on which to evaluate Fox's performance as licensee of KTTV begins on March 6, 1986 (the date Fox acquired KTTV from Metromedia), and ends on November 30, 1988 (referred to herein as the "license term" or "renewal period") (Tr. 33). *See* 47 C.F.R. § 73.1020(a)(14)(ii).

The Los Angeles Television Market

16. During the renewal period, Los Angeles was ranked by Arbitron as the second largest television market in the United States. Its over 4 million television households were served in 1988 by at least 17 commercial television stations and five non-commercial television stations. During the renewal period, each of the three major television networks owned and operated a VHF television station licensed to Los Angeles. Four independent VHF stations, including KTTV, also were licensed to Los Angeles (Fox Ex. 1, pp. 3-4).

Ascertainment

17. KTTV made a continuous effort during the renewal period to ascertain the needs, interests and concerns of the Los Angeles community and the station's five-county southern California service area. To this end, KTTV managers and department heads were assigned to interview community leaders representing a broad cross section of the viewing area. Seventeen managers and department heads participated in the station's ascertainment efforts during the renewal period (Fox Ex. 2, p. 1).

18. Although not required by the Commission's Rules to do so, *see Commercial TV Stations*, 98 FCC 2d 1076, 1098-1101 (1984), during the renewal period KTTV conducted formal ascertainment of the needs, interests and concerns of the viewers in its service area. KTTV relied principally on three ascertainment methodologies: (1) KTTV representatives conducted in-person interviews with community leaders; (2) community leaders were invited to

attend group discussions of community concerns with representatives of KTTV management (some of the group ascertainment discussions were sponsored by KTTV alone; others were joint efforts by KTTV and other Los Angeles television stations); and (3) ascertainment interviews were conducted by telephone when circumstances prevented an in-person meeting (Fox Ex. 2, p. 1).

19. Employing these methods, KTTV conducted a total of 269 formal ascertainment interviews with community leaders during the renewal period. Of these, 150 (56 percent) were conducted by means of group discussions; 87 (32 percent) were one-on-one interviews; and 32 (12 percent) were telephone interviews (Fox Ex. 2, pp. 1-2).

20. In both the individual interview and group discussion settings, community leaders were asked to reflect on the problems and needs of the community in general, and to specify the single most serious problem that they believed confronted the community. Ascertainees also were invited to comment on county, statewide, and national problems and concerns, and to offer suggestions as to how KTTV might better serve its constituent communities. The remarks and views of each community leader were recorded on a KTTV Community Leader Interview Report (Fox Ex. 2, p. 2).

21. KTTV supplemented its formal ascertainment program through interviews with guests on its regularly scheduled public affairs and news programs, and through informal contacts with community leaders by the station's Public Affairs Director, who attended community functions throughout the station's service area. These included community center openings, professional organization meetings, cultural events, fundraisers, awards presentations, special interest group meetings, and media public service seminars and meetings. The Public Affairs Director also participated as a guest speaker and moderator at community events. The Public Affairs Director submitted written reports to the Program Director of her attendance at and participation in community events (Fox Ex. 2, p. 2).

22. The community leaders interviewed by KTTV during the renewal period included representatives of minority and women's group, community organizations, educational institutions including the public schools, religious organizations, the arts, local, state and federal governments, and the private business sector. In all, KTTV's 269 formal ascertainments included interviews with community leaders in each of twenty-one individual categories, as follows:[2]

Community Category	Number of Community Leaders
1. Agriculture	4
2. Business	23
3. Charities	14
4. Civic/Neighborhood	13
5. Consumer Services	3
6. Culture	7
7. Education	25
8. Elderly	5
9. Environment	17
10. Gay	1
11. Government	1
12. Handicapped	39
13. Labor	6
14. Military	24
15. Minority/Ethnic	24
16. Professions	6
17. Public Safety/Health	33
18. Recreation	9
19. Religion	7
20. Youth/Students	16
21. Women	3

(Fox Ex. 2, p. 3).

23. In addition, KTTV's ascertainments were conducted to ensure racial, ethnic, culture and geographic diversity, in rough proportion to the total population distribution in the station's service area. Thus, for example, minorities accounted for the following approximate percentages of total ascertainments during the renewal period:

Hispanic:	35 percent
Black:	15 percent
Asian:	5 percent
Indian:	1 percent

(Fox Ex. 2, p. 4).

24. The geographic distribution of ascertainment interviews throughout KTTV's five county service area was as follows:

Los Angeles:	53 percent
Orange:	26 percent
San Bernardino:	16 percent
Riverside:	3 percent
Ventura:	1 percent

(Fox Ex. 2, p. 4).

25. The numerous concerns identified by KTTV's ascertainment interviews were incorporated into the station's program planning process on an ongoing basis. KTTV's Public Affairs Director reviewed and analyzed the completed ascertainments on a monthly basis. Periodic statistical tabulations or narrative summaries of ascertainment data were provided to KTTV's Program Director, as follows:

April 1986
May 1986
June 1986
July 1986
August 1986
November 1986
March 1987
April 1987
June 1987
July 1987
January 1988
March 1988
April 1988
July 1988
September 1988

(Fox Ex. 2, pp. 4-5).

26. KTTV's Program Director, on the basis of the concerns specified by community leaders, then determined the most significant categories of problems and needs to be addressed by the station (Fox Ex. 2, p. 5).

27. During the renewal period, the specific concerns expressed by community leaders generally were encompassed within the following categories of significant problems and needs:

1. Social Services/Government
2. Educational/Recreation/Family
3. Crime/Law
4. Minorities/Immigration
5. Transportation/Traffic/Repairs
6. Environment/Energy/Pollution
7. Substance Abuse/Health
8. Women/Elderly/Handicapped
9. Economy/Inflation/Unemployment
10. Housing/Urban Renewal

(Fox Ex. 2, p. 5).

28. These categories provided the focus for KTTV's news and public affairs programming during the renewal period. Information collected through the ascertainment process was shared with program producers by means of periodic reports and weekly staff meetings (Tr. 567). KTTV's programming, in particular its daily news coverage, reflected the periodic shifts in emphasis in specific ascertained problems and needs that occurred within each of these categories during the renewal period (Fox Ex. 2, pp. 5-6).

29. In addition, as noted above, KTTV's Public Affairs Director reported to the Program Director on a monthly basis regarding her participation in community outreach activities. She made periodic recommendations and suggestions regarding programming and public service campaigns responsive to the problems and needs of the organizations or special interests involved. She also brought producers, talent and special projects to the attention of the Program Director (Fox Ex. 2, p. 6).

30. Each quarter during the renewal period, KTTV prepared and placed in its Public File a list of the programming the station had provided in response to the ascertained problems and needs of greatest significance to the station's viewers. Fox Exhibits 3-8 provided representative examples of the types and scope of programming presented by KTTV to address the various concerns of its service area during the renewal period (Fox Ex. 2, p. 6).

31. The ascertainment process served not only as a vehicle for monitoring local problems and concerns affecting the various segments of KTTV's audience, but also as a way to maintain a dialogue with community leaders. Thus, for example, ascertainment interviews were at times preceded by a brief introductory presentation about obtaining public service and public affairs time on KTTV, and copies of the station's PSA brochure were distributed. Community leader interviews also were helpful at times in identifying potential guests for the station's public affairs and news interview programs. Station representatives were instructed to note an interviewee's interest in appearing on a KTTV public affairs or news program in connection with his or her area of expertise or interest (Fox Ex. 2, pp. 6-7).[3]

Programming

Public Affairs Program

32. KTTV broadcast six regularly scheduled public affairs programs during the renewal period in order to address the problems and needs of the Los Angeles community, as identified through the station's ongoing ascertainment process. In addition, KTTV broadcast three general interest programs that regularly examined subjects of local or national significance, and included reports on consumer and health issues. These programs included the following:

33. "*Good Day L.A.*": A 30-minute, locally produced public affairs program, broadcast on Saturday mornings from March 6, 1986, through September 5, 1987. (From March 6, 1986, through September 10, 1986, the program was rebroadcast on Wednesday mornings.) "Good Day L.A." addressed specific issues that had been identified in KTTV's ongoing ascertainment process. The program included interviews and panel discussions with community leaders and activists. Participants were drawn from a cross section of the community in order to present a diverse range of views (Fox Ex. 3, pp. 1-2).

34. KTTV also presented a periodic special segment within "Good Day L.A." in cooperation with the Los Angeles County Department of Children's Services, which provided area children with protective services, foster care and adoption placement. Between March 1986 and August 1987, KTTV broadcast approximately 15 "Eleven's Kids" segments during "Good Day L.A." These segments, which ranged in length from approximately 4 to 8 minutes, allowed DCS representatives to introduce to KTTV viewers children who were eligible for adoption. The segments focused on hard to place children -- particularly older black and Hispanic children (Fox Ex. 3, p. 2).

35. "*New Forces*": A 30-minute, locally produced public affairs program, broadcast on Saturday mornings from March 6, 1986, through June 7, 1986. (The program was repeated on the following Friday morning.) This series focused on the unique problems and needs of the Los Angeles handicapped community. Hosted by a handicapped person who was confined to a wheelchair, and originated entirely on location, the program profiled the lives of handicapped persons and examined the physical and emotional problems they must endure on a daily basis. "New Forces" also urged employers and others to meet the needs of the handicapped by supplying access ramps, installing special restroom facilities and offering recreation programs suitable for handicapped individuals (Fox Ex. 3, pp. 2-3; Tr. 449).

36. "*Speak Out*": A 30-minute, locally produced public affairs program, broadcast on Saturday mornings from March 6, 1986, through August 8, 1987. (Between March 6, 1986, and June 26, 1986, the programs were rebroadcast on Thursday mornings.) This series, produced by KTTV in cooperation with a local religious organization, encouraged dialogue and cooperation among the numerous diverse communities in its service area. It brought together community leaders and representatives to discuss in a panel format issues of mutual concern (Fox Ex. 3, p. 3; Tr. 569).

37. "*Midday Sunday*": A 30-minute, locally produced public affairs program, broadcast on Sunday mornings from September 13, 1987, through the end of the renewal period (November 30, 1988). "Midday Sunday" presented

interviews and discussions with community leaders on subjects of concerns to viewers in KTTV's service area. Participants were drawn from a cross section of the community in order to ensure a diverse range of views. Midday Sunday was nominated for a 1987 local Emmy award as Best Public Affairs Series -- Independent Station, and for a 1988 local Emmy award as Best Public Affairs Series (Studio Based) (Fox Ex. 3, pp. 3-4; Fox Ex. 10, pp. 3-4).

38. "*Life Be In It*": A series of 15 individual segments ranging in length from 10 to 65 seconds that encouraged viewers to lead healthy and active lives by exploring nature and becoming involved in community activities. In particular, the series challenged viewers to refrain from watching television and instead to seek out active pursuits. Beginning on June 14, 1988, the segments were broadcast in rotation between two and thirteen times daily (except for November 22-25, 1988) through the remainder of the renewal period (November 30, 1988) (Fox Ex. 3. p. 4). KTTV Program Director Don Tillman explained that these program segments an other short-form programming (*see infra* at ¶¶ 74-76) ran, on different schedules, as either program material or public service announcements (Tr. 560-561). The "Life Be In It" segments broadcast in public service positions are tallied in Fox Exhibit 8.

39. "*America's Most Wanted*": A 30-minute prime time public affairs program broadcast Sundays evenings in prime time beginning February 7, 1988, and continuing through the end of the renewal period (November 30, 1988). The program profiled fugitives sought by the FBI and provided details about their cases. It also solicited information from viewers in connection with law enforcement agency efforts to apprehend these fugitives, and resulted in the arrest of a large number of fugitives (Fox Ex. 3, pp. 4-5; Tr. 1348).

40. "*A Current Affair*": A 30-minute general interest program broadcast during prime time on Monday through Friday evenings beginning June 22, 1987, and continuing through the end of the renewal period (November 30, 1988). The program investigated news and human interest stories of local and national interest (Fox Ex. 3, p. 5).

41. "*Hour Magazine*": A 60-minute general interest program, broadcast at midday Monday through Friday between May 1987 and June 1988. This series dealt with a wide range of matters, including issues and human interest stories. The program developed its subject matter largely through interviews with local and national figures (Fox Ex. 3, p. 5).

42. "*PM Magazine*": A 30-minute, general interest program, broadcast during prime time on Monday through Friday evenings between March 6, 1986, and August 29, 1986.[3] "PM Magazine" presented a mix of nationally and locally produced segments. Local segments, which were produced on a daily basis by KTTV (Tr. 471-472), focused on issues and events of local interest, and highlighted the efforts and accomplishments of individuals in the Los Angeles community. "PM Magazine" also offered regular segments providing information on a variety of consumer issues (Fox Ex. 3, p. 5).

43. Included in Fox Exhibit 3 (pp. 7-80) was a representative compilation of individual public affairs program segments broadcast by KTTV during the renewal period. The following are examples of the public affairs programming aired on KTTV during the renewal period in response to the various needs, interests and concerns of the community.

Social Services/Government:

Robert J. Clark, Corporate Director of Community Programs for Northrop Corporation, discussed the "Job Training Partnership Act" ("Good Day L.A." 6/86) (Fox Ex. 3, p. 12).

Dr. J. Anwyl, Executive Director of Planned Parenthood, described the services available through Planned Parenthood and the philosophy of the "pro-choice" movement ("Good Day L.A." 8/86) (Fox Ex. 3, p. 15).

Dr. Robert Burns discussed the Los Angeles Social Services Department's efforts to reduce fraudulent charitable solicitations ("Good Day L.A." 9/86) (Fox Ex. 3, p. 17).

Charles Weissburel, Los Angeles County Registrar, discussed the importance of registering to vote in the upcoming November election ("Good Day L.A." 9/86) (Fox Ex. 3, p. 17).

City and County of Los Angeles coordinators for the Homeless Project discussed city and county efforts to alleviate homelessness ("Midday Sunday" 1/88) (Fox Ex. 3, p. 56).

Education/Recreation/Family:

Arthur Avila, President of East Los Angeles College, discussed the college's educational objectives ("Good Day L.A." 10/86) (Fox Ex. 3, p. 19).

Janice Kern, Director of the Los Angeles Adolescent Pregnancy "Childwatch" program, discussed efforts to combat the rise in teen pregnancy ("Good Day L.A." 11/86) (Fox Ex. 3, p. 20).

A discussion of a proposal by the Los Angeles City Council to create a cultural arts program targetting both children and adults ("Speak Out" 5/86) (Fox Ex. 3, p. 44).

Senior Los Angeles Public Schools officials discussed a proposal to implement a year-round school calendar to alleviate overcrowding ("Midday Sunday" 9/87) (Fox Ex. 3, p. 50).

District Attorney Ira Reiner discussed his office's efforts to enforce delinquent child support payments ("Midday Sunday" 11/87) (Fox Ex. 3, p. 52).

Crime/Law:

Richard Embry, Program Manager of the San Fernando Valley Child Guidance Clinic, discussed the Clinic's "Juvenile Offense Prevention Program" ("Good Day L.A." 6/86) (Fox Ex. 3, p. 17).

Deputy Chief Glenn Levant discussed the L.A.P.D.'s role in eradicating gang violence ("Midday Sunday" 1/88) (Fox Ex. 3, p. 56).

Representatives of the Los Angeles Sheriff's Department, the American Civil Liberties Union, and a community organization debated proposed new prison construction ("Midday Sunday" 2/88) (Fox Ex. 3, p. 57).

Bill Rutland, Legislative Assistant to California State Assembly Speaker Willie Brown, discussed a legislative initiative to deal with gang violence ("Midday Sunday" 8/88) (Fox Ex. 3, p. 60).

Representatives of the Santa Monica Rape Treatment Center discussed the problem of rape on college campuses ("Midday Sunday" 9/88) (Fox Ex. 3, p. 62).

Minorities/Immigration:

Representatives of the Community Service Organization discussed their organization's programs in the Hispanic community ("Good Day L.A." 4/86) (Fox Ex. 3, p. 8).

Representatives of Cleland House discussed their organization's efforts to improve the standard of living in the Hispanic community ("Good Day L.A." 5/86) (Fox Ex. 3, p. 10).

Mamie Clayton, Executive Director of the Western States Black Research Center, and Hal DeWindt, a film producer and director, discussed the historical involvement of blacks in the film industry ("Good Day L.A." 1/87) (Fox Ex. 3, p. 24).

A discussion of the problems and needs confronting the Native American community ("Speak Out" 1/87) (Fox Ex. 3, p. 47).

Domingo Rodriguez, Supervisor of the Los Angeles Public Schools' Amnesty Preparation and Citizenship Project, discussed the public schools' citizenship preparation program ("Midday Sunday" 6/88) (Fox Ex. 3, p. 59).

Transportation/Traffic/Repairs:

Ted Widby, President of "Commuter Computer," discussed car pooling as a way to save gasoline and reduce congestion and pollution ("Good Day L.A." 4/86) (Fox Ex. 3, p. 8).

W. T. Maloney discussed California Transit's efforts to accommodate the increasing volume of vehicles on state freeways ("Good Day L.A." 8/86) (Fox Ex. 3, p. 15).

Jim Gosnell, Transporation Planning Director for the Southern California Association of Governments, discussed problems likely to face commuters in the year 2010 ("Midday Sunday" 9/87) (Fox Ex. 3, p. 50).

A representative of the California Highway Patrol discussed the Patrol's sobriety checkpoint program ("Midday Sunday" 11/98) (Fox Ex. 3, p. 54).

Lorraine Lawrence, of the Consumer Product Safety Commission, discussed the Justice Department's ban on sales of All Terrain Vehicles ("Midday Sunday" 1/88) (Fox Ex. 3, p. 55).

Environment/Energy/Pollution:

Mike McGuire, Director of the Metropolitan Water District's Water Quality Division, discussed the agency's water quality test and warned of unscrupulous vendors of water purification equipment ("Good Day L.A." 7/86) (Fox Ex. 3, p. 13).

Delwin Biagi, Director of the Los Angeles Bureau of Sanitation, discussed a project to convert landfill waste into energy ("Good Day L.A." 3/87) (Fox Ex. 3, p. 26).

Representatives of RecyCal and the California State Recycling Division debated the effectiveness of the state's recycling laws ("Midday Sunday" 8/88) (Fox Ex. 3, p. 61).

Zev Yaroslavsky, Los Angeles City Councilman, and Mickey Kantor, an attorney for Occidental Petroleum, debated the merits of two ballot initiatives regarding oil exploration in the Pacific Palisades ("Midday Sunday" 10/88) (Fox Ex. 3, p. 63).

Substance Abuse/Health:

Ken Hickman, President of the Central Los Angeles Unit of the American Cancer Society, discussed cancer prevention ("Good Day L.A." 5/86) (Fox 3, p. 9).

Paula Van Ness, Executive Director of the AIDS Project of Los Angeles, explained her organization's services for AIDS patients ("Good Day L.A." 1/87) (Fox Ex. 3, p. 23).

Betty Hanna Witherspoon, Executive Director of the Rosa Parks Sexual Assault Crisis Center, discussed the Center's services in connection with the physical and emotional trauma of sexual assault ("Good Day L.A." 5/87) (Fox Ex. 3, p. 29).

Dr. Shirley Fannin, Associate Deputy Director of the Los Angeles County Disease Control Program, discussed the need for public education about AIDS ("Midday Sunday" 10/87) (Fox Ex. 3, p. 51).

Dr. Mitch Nides, a lung specialist, discussed a UCLA study concerning the long term dangers of smoking ("Midday Sunday" 11/87) (Fox Ex. 3, p. 53).

Veronica Gomez, head of an AIDS youth outreach program, and Dr. Joseph Church, Co-director of the Los Angeles Children's Hospital AIDS Project, discussed the alarming increase in the incidence of AIDS among young people ("Midday Sunday" 7/88) (Fox Ex. 3, p. 59).

Women/Elderly/Handicapped:

Cynthia Moyer, Easter Seals Program Assistant, provided information about the Society's summer camp for children with disabilities ("New Forces" 4/86) (Fox Ex. 3, p. 40).

Kathye Murphy, Executive Director of the Career Planning Center, discussed the Center's objectives and opportunities for women in the workplace ("Good Day L.A." 10/86) (Fox Ex. 3, p. 19).

June Isaacson Kailes, Executive Director of the Westside Center for Independent Living, discussed the challenges facing the disabled and the services offered by the Center ("Good Day L.A." 12/86) (Fox Ex. 3, p. 22).

Sandra Nuti, a social services worker, discussed alternative living arrangement for the elderly ("Good Day L.A." 7/87) (Fox Ex. 3, p. 32).

Columnist Ellen Goodman discussed the status of the women's movement during the Reagan administration ("Hour Magazine" 4/88) (Fox Ex. 3, p. 67).

Economy/Inflation/Unemployment:

Jeffrey Gutovich, a partner in Financial Resources Group, discussed the financial impact of the new tax laws ("Good Day L.A." 11/86) (Fox Ex. 3, p. 21).

Dorothy Bingham, Dr. Arie Brouwer, and the Reverend Mary Margaret Bever discussed cooperation among civic groups and churches in employment advocacy and food collection programs ("Speak Out" 4/86) (Fox Ex. 3, p. 43).

Gail Tweedy and Robert Owings discussed methods for obtaining employment ("Speak Out" 6/86) (Fox Ex. 3, p. 45).

Ken and Daria Dolan discussed budgeting for a family of four with a total income of $40,000 ("Hour Magazine" 4/88) (Fox Ex. 3, p. 68).

Housing/Urban Renewal:

Volunteers for Neighborhood Housing Services discussed the organization's efforts to improve the housing conditions of the poor ("Good Day L.A." 7/87) (Fox Ex. 3, p. 32).

Parker Anderson, a representative of the Los Angeles Department of Community Development, discussed the Department's efforts to coordinate neighborhood renewal projects ("Good Day L.A." 8/87) (Fox Ex. 3, p. 35).

Claudia Moore and Marie Sierra, Housing Projects Resident Council members, and Dorie Pye, Los Angeles Housing Commissioner, debated the extent of progress in improving conditions in Los Angeles' public housing facilities ("Midday Sunday" 2/88) (Fox Ex. 3, p. 57).

Henry Unger, business reporter for the Los Angeles Herald-Examiner, discussed the southern California housing market and provided information regarding home loans ("Midday Sunday" 10/88) (Fox Ex. 3, p. 63).

News Programs

44. During the renewal period KTTV presented locally produced coverage of local, national and international news responsive to the ascertained needs, interests and concerns of its community. KTTV broadcast both regularly scheduled daily news programs and periodic news Specials. In addition to spot coverage of breaking news, KTTV provided in-depth news coverage by means of investigative and documentary mini-series, interviews, and discussion segments presented within regularly scheduled newscasts. KTTV also interrupted or preempted its regularly scheduled non-news programming to cover breaking news of exceptional significance. In connection with the station's ascertainment efforts, KTTV's News Department compiled a monthly log of news coverage that was responsive to identified community problems and needs (Fox Ex. 4, p. 1). Representative examples of those logs were submitted in Fox Exhibit 4, Attachment A, pp. 14-115.

45. During the renewal period, KTTV's News Department employed an average of 14 newspersons (reporters), 17 professionals (producers, directors, writers, assignment editors, and graphic artists) and 17 technicians.[5] The station augmented its coverage of national and international developments with news feeds from Cable News Network and the news departments at other Fox-owned stations. Additionally, in the Fall of 1987, KTTV established a New Bureau in Orange County, California, in order to expand its coverage in the southern portion of its service area (Fox Ex. 4, pp. 1-2).

46. During the renewal period KTTV acquired both hardware and software to improve the efficiency and effectiveness of its news operation. Fox example, the station leased a helicopter for the exclusive, full-time use of the News Department (Tr. 483-484), purchased its first satellite news gathering (SNG) truck, capable of originating live programming, and acquired an additional microwave-linked mobile news gathering (ENG) van to expand its existing fleet of such vehicles. KTTV also computerized its News Department, which, as noted above, was interconnected with its counterparts at other Fox-owned television stations (Fox Ex. 4, p. 2).

47. *Regularly Scheduled News Programs*: During the renewal period, KTTV presented live, 30-minute news broadcasts between one and three times daily. Beginning in April 1988 and continuing through the remainder of the renewal period, KTTV also presented an early morning rebroadcast of the previous evening's newscast. These locally produced newscasts provided spot coverage of breaking news, sports and weather, as well as extended and ongoing coverage of ascertained problems and needs of viewers in Los Angeles and throughout KTTV's southern California service area (Fox Ex. 4, pp. 2-3).

48. The following regularly scheduled news programs were broadcast over KTTV during the renewal period:

The Midday News: A 30-minute, locally produced newscast, presented at 11:30 a.m., Monday through Friday, between March 6, 1986, and May 22, 1987.

The 8 O'Clock News: A 30-minute, locally produced prime time newscast, presented seven evenings a week between March 6, 1986, and the end of March 1987; thereafter, when weekend newscasts moved to 10:00 p.m., and through September 4, 1987, KTTV broadcast "The 8 O'Clock News" five evenings per week, Monday through Friday. KTTV was the only commercial television station in the Los Angeles market to present an 8:00 p.m. newscast during the renewal period.

The 11 O'Clock News: A 30-minute, locally produced newscast presented at 11:00 p.m., Monday through Friday, between March 6, 1986, and October 8, 1986.

The Midnight News: A 30-minute, locally produced newscast, presented at 12:00 midnight, Monday through Friday, between October 9, 1986, and September 3, 1987.

Fox News at Ten: A 30-minute, locally produced newscast presented at 10:00 p.m., seven nights a week, between September 5, 1987 and May 1, 1988; thereafter, when the Sunday edition was rescheduled, and continuing through the remainder of the renewal period, "Fox News at Ten" was broadcast six nights a week, Monday through Saturday. "Fox News at 10" was the winner of a 1987 local Emmy award for Best Regularly Scheduled Daily News Program (Tr. 578). Beginning in September 1988, "Fox News at Ten" was simulcast in Spanish over the second

audio program (SAP) channel of KTTV's stereo transmission system. The translation was provided by an interpreter utilizing the program script and listening to the audio portion of the broadcast.

Fox News Repeat: A rebroadcast of "Fox News at Ten," presented Tuesday through Saturday mornings (Monday through Friday nights), beginning April 18, 1988, and continuing through the remainder of the renewal period. Between April 18 and August 9, 1988, the program was broadcast between 12:00 midnight and 12:30 a.m. Beginning August 9, 1988, the nightly broadcast was presented between 12:30 and 1:00 a.m.

Sunday Newscasts: Between May 1, 1988, and August 28, 1988, KTTV's 30-minute Sunday evening newscast was broadcast between 11:00 and 11:30 p.m. as "Fox News at 11;" thereafter, and through the remainder of the renewal period, the program was broadcast between 10:30 and 11:00 p.m. as "Fox News Sunday."

(Fox Ex. 4, pp. 3-4).

49. *Special Coverage of Breaking News*: KTTV supplemented its regularly scheduled news broadcasts with extended coverage of events of special significance of interest to viewers in its service area. Special coverage was presented by interrupting or preempting regularly scheduled non-news programming (Fox Ex. 4, p. 4).

50. Examples of special news and events coverage broadcast by KTTV during the renewal period include the following:

Cerritos Air Disaster: KTTV News broadcast a special edition reporting a major air collision over Cerritos, California, at 7:15 p.m. on August 31, 1986. Additional live updates were broadcast through the evening. KTTV's coverage won a 1986 local Emmy award for Best Spot News Same Day Breaking Story.

Papal Visit: On September 15-17, 1987, KTTV provided approximately 14.5 hours of coverage of the visit to Los Angeles by Pope John Paul II, including a broadcast of the Pontiff's celebration of Mass at Dodger Stadium. KTTV's coverage of the Dodger Stadium Mass was nominated for a 1987 local Emmy award for Best Director of Unedited Program-News.

California Earthquake: Beginning at approximately 7:45 a.m. on October 1, 1987, KTTV interrupted its regularly scheduled programming to provide live coverage of a major earthquake in southern California.

Stock Market Crash: KTTV interrupted its regularly scheduled morning programming beginning at 6:00 a.m. on October 20, 1987, to broadcast special reports regarding the previous day's market decline.

First Interstate Bank Fire: KTTV interrupted its regularly scheduled programming on the evening of May 4, 1988, to present continuing coverage of a major fire at the First Interstate Bank building in Los Angeles.

(Fox Ex. 4, pp. 4-5).

51. *Expanded Coverage Within Regularly Scheduled News Programs*: KTTV employed a variety of means to explore the circumstances surrounding news events, and to enhance its viewers' understanding of topical issues. To this end, KTTV's regularly scheduled news programs included investigative and documentary mini-series, as well as interview and discussion segments (Fox Ex. 4, pp. 5-6).

52. Examples of multi-segment investigative reports presented within KTTV's regularly scheduled news broadcasts during the renewal period include the following:

"*Dose of Deception*": A five-part mini-series presented within KTTV's 8:00 p.m. newscasts on June 22 - 24, 29, and 30, 1987, reported on Interleukin-2 and other experimental drugs used in the treatment of AIDS and cancer patients. "Dose of Deception" was nominated for a 1987 Emmy Award in the Mini-Docs category.

"*Cashing in on AIDS*": a five-part mini-series presented within KTTV's 10:00 p.m. newscasts on September 20-24, 1987, investigated possible medical and ethical abuses by HIV testing facilities in southern California. "Cashing in on AIDS" received a 1987 Greater Los Angeles Press Club Certificate of Excellence in the investigative reporting category.

"*Death in the Orange County Jail*": a four-part mini-series presented within KTTV's 10:00 p.m. newscasts on October 9 - 12, 1987, investigated overcrowded conditions at Orange County Jail, and the circumstances surrounding inmate deaths at that facility. "Death in the Orange County Jail" was nominated for a 1987 Emmy Award, and received a 1987 Greater Los Angeles Press Club Certificate of Excellence in the investigative reporting category.

(Fox Ex. 4, p. 6).

53. KTTV's Midday News provided in-depth coverage of topical issues of concern to viewers through live studio interviews, discussions and debates. Examples of such coverage include the following:

Handgun Control: Extensive coverage of pending handgun control legislation, including interviews with supporters and opponents of the legislation, broadcast April 9 - 10, 1986.

Insurance: Coverage of recent changes in the insurance industry, particularly with regard to medical malpractice insurance, broadcast on April 14, 1986. The broadcast featured an interview regarding the causes of increases in insurance premiums.

Nuclear Testing: An interview of author Howard Fall, who discussed the effects of underground nuclear testing during the 1950s and continuing underground tests, broadcast on April 16, 1986.

Pornography and the First Amendment: An interview of a representative of the American Civil Liberties Union regarding the First Amendment and pornography, in connection with a recent decision by Southland Corporation to restrict sales of adult magazines at its 7-11 Stores, broadcast on April 17, 1986.

Drug and Alcohol Abuse: An interview of UCLA Dean Rodney Skoger, who discussed the incidence of drug and alcohol use among California teenagers, broadcast on May 6, 1986.

Teen Suicide: An interview of psychiatrist Dr. John Baucom, who discussed the incidence and prevention of teen suicide, broadcast on May 21, 1986.

Proposition 51: Presentations by opponents and supporters of Proposition 51, a California ballot initiative, broadcast on May 28 - 29, 1986.

Pornography: A discussion regarding the conclusions of the Meese Commission's Report on Pornography, broadcast on June 2, 1986.

Hysterectomy: An interview regarding controversy over the increasing frequency in the performance of hysterectomies, broadcast on June 4, 1986.

The Right to Die: A discussion with representatives of the Hemlock Society about issues regarding the right to die, broadcast on June 6, 1986.

Stock Market Analysis: An interview of financial analyst Don Glostein regarding the causes and effects of recent market volatility, broadcast on June 10, 1986.

Farmworkers' Health Issues: An interview of Cesar Chavez regarding health hazards to farmworkers posed by the use of pesticides on grape crops, broadcast on June 17, 1986.

Pacific Bell Consumer Refunds: An interview of a Pacific Bell Telephone Company representative, broadcast on August 7, 1986, regarding procedures for distribution of consumer refunds ordered by the California Public Utilities Commission.

RTD Safety: A discussion about current efforts to improve training and safety of RTD bus drivers, broadcast on August 8, 1986.

Ozone Depletion: A discussion of the effects of changes in the ozone layer on crops and forests in southern California, broadcast on August 28, 1986.

Cerritos Air Disaster: Following up on the station's Cerritos air crash coverage, an interview of a representative of the Air Line Pilots Association, broadcast on September 2, 1986, regarding work load, stress and other factors affecting the job performance of air traffic controllers.

Student Test Scores: An interview of a local educator, broadcast on September 3, 1986, regarding a recent drop in standardized test scores by Los Angeles' eighth grade students.

Tax Reform Legislation: An interview of a tax advisor, broadcast on September 4, 1986, regarding the significance of federal tax reform legislation for individual taxpayers.

Cerritos Air Disaster: Continued Cerritos air crash coverage with a live studio interview, broadcast on September 5, 1986, of an air traffic controller regarding work load and job performance issues.

East Los Angeles Prison Proposal: Presentations by supporters and opponents of proposed prison construction in East Los Angeles, broadcast on September 9 - 10, 1986.

Food Irradiation: Opposing presentations, broadcast on September 10 - 11, 1986, by a representative of the Environmental Protection Agency and a health organization regarding the costs and benefits of food irradiation.

Political Action: An interview of activist Tom Hayden, broadcast on September 17, 1986, regarding his Santa Monica-based political action organization.

Maternity Leave: Opposing presentations regarding mandatory maternity leave, broadcast on September 17 - 18, 1986.

Proposition 65: Presentations by supporters and opponents of Proposition 65, a California ballot initiative, broadcast on October 13 - 14, 1986.

Gubernatorial Race: Opposing presentations by gubernatorial candidates McCarthy and Curb, broadcast on October 20 - 21, 1986.

Drug Abuse: An interview of Sheriff Sherman Block, broadcast on November 10, 1986, regarding drug abuse in Los Angeles and throughout the United States.

Mandatory Drug Testing: Interviews of supporters and opponents of workplace drug testing, broadcast on November 11 - 13, 1986.

(Fox Ex. 4, pp. 7-9).

54. In 1988, KTTV News presented periodic reports on issues of particular interest to senior citizens. These reports, broadcast during the station's weekend evening newscasts, included the following:

Discounts for Senior Citizens: A report on discount programs available to senior citizens, broadcast on May 1, 1988.

Health Care for the Elderly: A special report on problems of health care for the elderly, broadcast on June 12, 1988.

Prescription Drug Hazards: A report on the hazards to the elderly posed by certain prescription drugs, broadcast on July 3, 1988.

Savings Opportunities: A report on savings opportunities for senior citizens, broadcast on August 7, 1988.

Employment Opportunities: A report on employment opportunities for senior citizens at airline companies, broadcast on September 3, 1988.

Fraudulent Advertising Claims: A report warning the elderly about fraudulent claims in newspaper advertisements, broadcast on September 11, 1988.

Living Trust: A report on the advantages of a living trust mechanism, broadcast on October 1, 1988.

Election Issues: A report on election issues relevant to citizens over the age of 55, broadcast on November 5, 1988.

Shared Housing: A report on trends in shared housing among the elderly, broadcast on November 13, 1988.

(Fox Ex. 4, pp. 9-10).

55. "*Troubleshooter*" *Segments*: KTTV's evening newscasts featured periodic "Troubleshooter" segments. The News Department's Troubleshooter reports responded to viewer concerns and complaints regarding local business establishments and governmental agencies, and assisted in crime prevention and other matters (Fox Ex. 4, p. 10).

56. Beginning in November 1987, "Troubleshooter" segments were augmented by direct telephone assistance to viewers. A toll-free referral hotline staffed by members of the Junior League and the American Association of University Women directed callers to appropriate consumer or social service agencies for help in resolving their problems or concerns (Fox Ex. 4, pp. 10-11).

57. Troubleshooter segments presented during the renewal period included the following:

Health Code Violation: An investigation of health violations by Los Angeles restaurants, broadcast on October 27, 1986.

Taxi Driver Assault: A report regarding a violent assault on a Los Angeles taxi driver, broadcast on November 26, 1986. The report was coupled with the offer of $3,000 reward for information leading to the arrest of those responsible.

Automobile Accident Fraud: A report on bogus automobile accidents staged by professionals, broadcast on April 30, 1987.

Telephone Billing Practices: A report on consumer confusion over telephone service billing practices, broadcast on April 8, 1987.

Little League Field: A report on efforts to help Little League baseball players continue to have use of their playing field in Canyon Country, broadcast on April 6, 1987.

RTD Claims: An investigation of false claims filed against the RTD, broadcast on May 9, 1987.

Government Responsiveness: A report regarding the alleged lack of responsiveness to citizen concerns by city officials, broadcast on May 27, 1987.

Drug Dealing: A report responding to children who have written to complain about the presence of drug dealers in their neighborhood, broadcast on May 18, 1987.

Gas Leak: An investigation of a chlorine gas leak, broadcast on June 17, 1987.

Small Claims Court: A two-part report, broadcast on June 10 - 11, 1987, investigating viewer complaints regarding uncollected small claims court judgments.

Boy Scouts' Park Use: A report on efforts to assist Boy Scouts to regain the use of a park building, broadcast on July 9, 1987.

AIDS Hotline: An investigation of an AIDS hotline that is alleged to be defrauding callers, broadcast on August 9, 1987.

Police Violence: An investigation of a police officer accused of violent activities, broadcast on August 23, 1987.

Children and Weapons: A four-part series, broadcast on November 16 - 19, 1987, on the possession and use of illegal weapons by school children.

Programs for the Homeless: An investigation of programs for homeless wards of the courts, broadcast on January 31, 1988.

Hit and Run Suspect: A report on efforts to identify a suspected hit and run driver, broadcast on March 6, 1988.

(Fox Ex. 4, pp. 11-12).

Special Programs

58. From time to time throughout the renewal period, KTTV preempted its regularly scheduled programming to broadcast programs on matters of special interest to viewers within its service area. KTTV presented special programs in the following categories: Public Affairs and News, including two series of periodic specials -- "For Kids' Sake" and "Infinite Voyage"; sports; special events; awards and tributes; and charitable fundraising (Fox Ex. 5, p. 1).

59. Special programs broadcast between March 6, 1986, and November 30, 1988, including the following:

Public Affairs and News Specials

"*American Treasure: A Smithsonian Journey*" aired on March 23, 1986 from 8:30 to 10:00 p.m. This program reflected on America's heritage, achievements and aspirations as represented by the collections in the museums of the Smithsonian Institution.

"*California Lotto Special*" was broadcast on October 18, 1986 from 7:30 to 8:00 p.m. This KTTV-produced program introduced the new California state lottery. KTTV Program Director Don Tillman testified that the program was presented in response to a public "outcry" for information regarding the new lotto drawing (Tr. 492, 594). It provided instruction for playing the various games, explained how winners were selected, and how the proceeds would be utilized (Tr. 491).

"*Trial of Greed - Trail of Death*" aired on November 14, 1986 from 8:30 to 9:00 p.m. This exclusive investigative report, produced by KTTV's News Department, examined the drug problem in the United States and Mexico. Hosted by a KTTV News reporter who had recently visited Mexico, the program took viewers to the primary narcotics producing areas in Mexico, and included interviews with Mexican authorities and a well known drug traffic expert.

"*POW - Americans in Enemy Hands: World War II, Korea and Vietnam*" aired on January 27, 1987 from 9:00 to 11:00 p.m. This documentary consisted of firsthand accounts by former prisoners of war of their experiences in captivity. Focusing on nine Americans held prisoner in Europe, Korea and Vietnam, the program detailed their surrender, day-to-day survival, torture and brainwashing, attempted escapes, waiting families and homecomings.

"*DWI: Deadliest Weapon in America*" aired on April 4, 1987 from 10:00 to 11:00 p.m. This program documented the high correlation between deadly automobile accidents and drunken driving, emphasizing the dangers posed by persons who drive while intoxicated.

"*The National AIDS Test - What Do You Know About Acquired Immune Deficiency Syndrome*?" aired on September 17, 1987 from 8:00 to 10:00 p.m. This program presented a televised test comprising 55 multiple-choice and true-or-false questions posed by celebrities and answered by the Surgeon General and other health experts. Broadcast without commercial interruption and produced in cooperation with the federal government, the special served as an informational forerunner to National AIDS Prevention Month in October of 1987.

"*The Stock Market Report*" aired on October 19, 1987 from 11:00 to 11:30 p.m. This KTTV News special, portions of which were locally produced, explained the causes and effects of the stock market crash.

"*Angel of Death*" aired on December 6, 1987, from 10:30 to 11:30 p.m. This documentary profiled Donald Harvey, who confessed to the "mercy" killing of 58 people, mostly hospital patients. In addition to an interview with Harvey, the program included interviews with psychiatrists, members of Harvey's family, and a variety of people connected with this case.

"*What's Killing the Children* ?" aired on December 21, 1987 from 7:30 to 8:00 p.m. This exclusive investigative report, produced by KTTV's News Department, examined the high incidence of cancer among the children of McFarland, a small farming community in the San Joaquin Valley. "What's Killing the Children?" was nominated for a 1987 local Emmy Award, and was one of 17 national Emmy Award finalists for 1987. It also was honored with a 1987 Angel Award.

"*Martin Luther King Tribute*" This special series of eight 60-second segments, produced by KTTV, featured Los Angeles area schoolchildren sharing their thoughts and feelings about Dr. King. The segments were broadcast in rotation throughout January 18, 1988, in connection with the national holiday in Dr. King's honor.

"*Democratic Presidential Debate*" aired on February 28, 1988 from 1:00 to 3:30 p.m. In this election year special, KTTV presented live coverage of a debate among the candidates for the Democratic Party's presidential nomination.

"*The Home Restoration Show*" aired on April 14, 1988 from 9:30 to 10:00 a.m. This program contained various tips and suggestions to enable homeowners to complete minor repairs around their homes.

"*New York Primary Vote*" aired on April 19, 1988 from 10:30 to 11:00 p.m. This news special, produced in cooperation with sister station WNYW, New York, provided live coverage and analysis of the results from the presidential primary elections held that day in New York State.

"*Korean War: The Untold Story*" was presented on May 30, 1988 from 8:00 to 9:00 p.m. This dramatic documentary explored the causes and history of the Korean War.

"*The R.F.K. Story*" aired on June 6, 1988 from 10:30 to 11:00 p.m. This documentary, produced by KTTV, explored the lingering controversies surrounding the assassination of Robert F. Kennedy. It included interviews with family and friends of Kennedy, and also recalled the 1968 presidential campaign. "The R.F.K. Story" received a 1988 Angel Award, and was nominated for a 1988 local Emmy Award for Best Film/Tape Editor of News Features.

"*Cut Rate Daycare*" was presented on September 13, 1988 from 9:00 to 10:00 p.m. In this KTTV production, KTTV News examined the decline in the quality and maintenance of local Day Care programs.

"*Countdown to Discovery*" aired on September 27, 1988 from 8:00 to 9:00 p.m. This prelude to the launch of the space shuttle Discovery detailed the changes in the United States space program since the Challenger tragedy in January 1986. The special also included a retrospective on the evolution of the space program, and a report on current and future projects and goals. The program was co-produced by two of KTTV's sister stations, and was co-hosted by a news anchor from KTTV.

"*L.A. Magnet Schools.*" In March of each year during the renewal period, KTTV broadcast a 30-minute documentary on the progress and status of the Los Angeles public school system:

> "*L.A. Magnet Schools: Choice '86*" aired on March 15, 1986 from 7:30 to 8:00 p.m. and traced the evolution and progress of the Los Angeles Unified School District's "Magnet School" program.
>
> "*L.A. Magnet Schools: Choices '87*" aired on March 14, 1987 from 6:00 to 6:30 a.m. and offered interviews with parents, students, principals and program coordinators concerning the effectiveness of the Magnet School program.
>
> "L.A. Magnet Schools: Choice '88" aired on March 20, 1988 from 10:30 to 11:00 a.m. and involved an overall analysis of the educational programs provided within the Los Angeles school system.

(Fox Ex. 5, pp. 1-5).

60. "*For Kids' Sake" Specials:* During the renewal period, KTTV undertook an educational campaign entitled "For Kids' Sake." Designed to educate and inform parents about issues affecting their children's development, "For Kids' Sake" included periodic prime time documentary, educational and dramatic specials. (Fox Ex. 5, p. 4).

61. Three of the programs in the "For Kids' Sake" series were produced by KTTV; one of these was nominated for a local Emmy Award. In addition, KTTV developed a series of public service announcements in connection with this campaign. (Fox Ex. 4, p. 4).

62. "For Kids' Sake" specials broadcast between March 6, 1986, and November 30, 1988, included the following:

> "*Tender Places*" aired on April 4, 1986 from 9:00 to 10:00 p.m. This drama examined the impact of divorce on a young child.

"*Remembering Christa*" aired on January 28, 1987 from 8:30 to 9:00 p.m. This program looked at the tragic explosion of the space shuttle Challenger through a personal profile of Christa McAuliffe.

"*Kids and Drugs: A High Price to Pay*" aired on April 4, 1987 from 9:00 to 10:00 p.m. This program profiled the lives of four children attempting to overcome drug addiction. The program examined rehabilitation and prevention programs, and the effect on the children's personalities, their families and communities.

"*Street Shadows*" aired on July 6, 1987 from 9:00 to 10:00 p.m. This investigative report documented the harsh experiences and lifestyles of runaway youths. The program included interviews with children living on the street, and looked at how they attempt to survive.

"*School on Trial*" aired on September 3, 1987 from 9:00 to 10:00 p.m. This dramatic special examined the problems of public education in America.

"*Drop Everything and Read*" aired on September 3, 1987 from 10:00 to 11:00 p.m. This documentary explored America's literacy problem, and focused on successful methods for encouraging children to improve their reading skills.

"*When I Was Your Age*" aired on October 23, 1987 from 9:00 to 10:00 p.m. This segment compared and contrasted the current generation of children to the baby boom generation of their parents.

"*Working It Out: Kids and Race*" aired on October 23, 1987 from 9:00 to 10:00 p.m. This special focused on a weekend encounter group in which nine children of varied backgrounds explored their feelings about stereotypes and prejudice.

"*A Time to Care*" was broadcast on December 3, 1987 from 8:00 to 9:00 p.m. Produced by KTTV, this program examined the development of relationships between children and their parents.

"*What's the Matter With Parents Today*?" aired on December 28, 1987 from 8:00 to 9:00 p.m. This program, produced by KTTV, dealt with the problem of communication between children and their parents. "What's the Matter With Parents Today?" was nominated for a 1987 local Emmy Award nominee for best Children's/Youth Special -- Independent Stations.

"*Youth Olympians*" aired on February 1, 1988 from 8:00 to 8:30 p.m. This program looked at the training process and regimen of three young Olympic hopefuls.

"*The Gift of Time*" aired on March 31, 1988 from 8:00 to 9:00 p.m. This program detailed the personal and social rewards of giving time to help needy children.

"*Making Peace With Dad*" was presented on April 25, 1988 from 8:00 to 9:00 p.m. Produced by KTTV, this special explored the relationships between fathers and children.

"*Teach Your Children Well*" aired on June 22, 1988 from 8:00 to 9:00 p.m. This special explored the increasing problem of children infected with the AIDS virus.

"*The Discovery Years*" aired on August 25, 1988 from 8:00 to 9:00 p.m. This documentary examined the first year relationship between parents and newborns.

(Fox Ex. 5, pp. 5-7).

63. "*Infinite Voyage*" *Specials*: Beginning in 1987, KTTV presented "The Infinite Voyage," a series of specials focusing on environmental and scientific issues. "The Infinite Voyage" profiled some of the world's most outstanding scientists and their exploration of the unknown. Through these specials, viewers were given insights into many of nature's mysteries, and offered solutions to present-day problems using advances in technology, science and other disciplines (Fox Ex. 5, p. 7).

64. Examples of specials in "The Infinite Voyage" series included the following:

1. "*Unseen Worlds*" aired on December 1, 1987 from 8:00 to 9:00 p.m. This program examined the microuniverses of the human body as well as the macrouniverses of other galaxies.

2. "*To the Edge of the Earth*" aired on January 11, 1988 from 8:00 to 9:00 p.m. This special accompanied scientists exploring life in places rarely traveled or inhabited by man.

3. "*Fires of the Mind*" aired on April 18, 1988 from 8:00 to 9:00 p.m. This program reported on the activities of scientists exploring human thought process and how the human mind functions.

4. "*The Geometry of Life*" aired on June 14, 1988 from 8:00 to 9:00 p.m. In this program, archaeologists searched North America to understand man's management of the physical world. The program reconstructed the experiences encountered by Asians who migrated across the Bering Strait.

(Fox Ex. 5, pp. 7-8).

65. *Sports Specials*: Periodically throughout the renewal period, KTTV provided special coverage of local and national sporting events. KTTV Program Director Don Tillman's uncontradicted testimony established that sports and recreational activities are very important to the Los Angeles Community, which also has many professional and amateur sports franchises (Tr. 606). Tillman testified that sports and recreation were consistently among the ascertained interests of the community (*id.*). Sports specials broadcast between March 6, 1986, and November 30, 1988, included the following:

"*The White House Tennis Tournament*" aired on October 24, 1987 from 1:00 to 2:00 p.m. This special provided coverage of a charity tennis tournament held at the White House.

"*Lakers Preview*" aired on November 1, 1987, from 10:30 to 11:30 p.m. This program, a production of KTTV Sports, profiled the members of the 1987/1988 Los Angeles Lakers basketball team, and assessed the team's chances for a championship season.

"*The U.S. Open Polo Championship*" was presented on November 15, 1987 from 3:30 to 4:30 p.m. KTTV produced and broadcast taped coverage of polo's national championship event from Palm Springs, California.

"*NFL Preview Show*" was broadcast on November 15, 1987 from 4:30 to 5:00 p.m. This program, a production of KTTV Sports, previewed an upcoming National Football League game to be broadcast locally on KTTV.

"*The Independence Bowl*" aired on December 19, 1987 from 5:00 to 8:00 p.m. This special provided live coverage of the annual college bowl football game.

"*The All American Bowl*" was shown on December 22, 1987, from 5:00 to 8:00 p.m. In this sports special, KTTV presented coverage of an annual college bowl football game.

"*NFL Preview Show*" aired on December 27, 1987 from 4:30 to 5:00 p.m. This program, a production of KTTV Sports, previewed an upcoming National Football League game to be broadcast locally on KTTV.

"*The Peach Bowl*" was shown on January 2, 1988 from 10:00 a.m. to 1:30 p.m. This sports special provided live coverage of the annual college bowl football game.

"*East-West Shrine Game*" was shown on January 16, 1988, from Noon to 3:00 p.m. This sports special provided live coverage of the annual college all-star game.

"*The Senior Bowl*" aired on January 23, 1988 from 10:00 a.m. to 1:00 p.m. This special provided live coverage of the annual college all-star football game.

(Fox Ex. 5, pp. 9-10).

66. During the renewal period, KTTV produced special programs regarding the Los Angeles Dodgers baseball team, many of whose games were broadcast on KTTV. According to Tillman, the public interest was well served by these specials, which focused on the Dodgers' personalities and organization, because of the important role played by the Dodgers in the Los Angeles community (Tr. 420-421, 582-583, 606). Special Dodgers programs broadcast between March 6, 1986, and November 30, 1988, included the following:

"*Tommy*" aired on March 8, 1986 from 8:30 to 9:00. This KTTV production highlighted the life of Los Angeles Dodgers Manager Tommy Lasorda on the 25th anniversary of his relationship with the team.

"*Dodgers' 25th Anniversary*" aired on February 28, 1987 from 8:30 to 9:00 p.m. Marking the 25th anniversary of the Dodgers' move to southern California, this retrospective, produced by KTTV, recalled the team's relocation and history in Los Angeles.

"*Blue of '62*" aired on March 1, 1987 from 10:00 to 11:00 p.m. This program, produced by KTTV, highlighted the personalities and accomplishments of the 1962 Dodgers team.

"*Made in Southern California*" aired on March 7, 1987 from 8:30 to 9:00 p.m. This pre-season special, produced by KTTV, profiled current Dodgers players who grew up in the southern California area.

"*Dodgers from Vero Beach*" aired on February 28, 1988 from 10:30 to 11:00 p.m. Produced by KTTV, this special provided live coverage from Florida to the Dodger's arrival for spring training.

"*Blue Print for '88*" was broadcast on March 6, 1988 from 10:30 to 11:00. This KTTV production previewed the upcoming baseball season for the Los Angeles Dodgers and analyzed the team's chances for a championship season.

(Fox Ex. 5, pp. 8-9).

67. *Special Events Coverage*: From time to time during the renewal period, KTTV broadcast coverage of local and national special events. Tillman testified, for example, that KTTV is known in the community as the "parade station" (Tr. 606-607). KTTV signed on with its first telecast of the Tournament of Roses Parade and has covered the parade in each of the 44 years since then (*id.*). On January 1, 1987 and January 1, 1988, KTTV produced special preview coverage of the Tournament of Roses Parade, and broadcast live coverage of the Parade itself, held annually in Pasadena, California. The "*Tournament of Roses Parade Preview*" aired from 7:00 to 8:00 a.m. and included interviews with performers and parade officials. The "*Tournament of Roses Parade*" was broadcast live from 8:00 to 10:30 a.m., and was rebroadcast during the day. KTTV not only broadcast the parade, but also profiled local participants, and provided background information on the construction and significance of the various parade floats (Fox Ex. 5, pp. 10-11).

68. Examples of other special events broadcast between March 6, 1986, and November 30, 1988, include the following:

"*The St. Patrick's Day Parade*" was shown on March 16, 1986 from 10:00 to 11:00 a.m. Produced by KTTV, this program provided live coverage of the annual parade that takes place on the streets of Beverly Hills.

"*500 Festival Parade*" was broadcast on May 24, 1986 from 10:00 a.m. to Noon. This program presented live coverage from Indianapolis, Indiana of events surrounding the annual Indianapolis 500 automobile race.

"*Portland Rose Festival*" aired on June 7, 1986 from 10:00 a.m. to Noon. Originating from Portland, Oregon, this special broadcast live coverage of the annual spring parade.

"*Cherry Blossom Parade*" was broadcast on April 11, 1987 from 10:00 a.m. to Noon. In this special, KTTV presented live coverage of the annual parade from Washington, D.C. celebrating the arrival of Spring.

"*Rose Bowl Kickoff Luncheon*" was broadcast on December 31, 1986 from 1:30 to 3:00 p.m. This program offered live coverage of the annual luncheon honoring the two rival college football teams playing in the New Year's Day Rose Bowl game held in Pasadena, California.

"*KTTV Christmas Card Special*" aired on December 24, 1987 from 8:00 to 10:00 p.m. This KTTV produced special highlighted the different ways members of the Los Angeles community celebrate Christmas. This program, which was presented without commercial interruption, featured scenes from around the greater Los Angeles area, accompanied by Christmas music (Tr. 607).

"*Beverly Hills Christmas*" was presented on December 25, 1987 from 1:00 to 2:00 p.m. Produced by KTTV, this program visited Christmas celebrations being held in the Beverly Hills area, and featured seasonal music.

"*Portland Rose Parade*" aired on June 11, 1988 from 10:00 a.m. to Noon. This special provided live coverage from Portland, Oregon of the annual Spring parade.

(Fox Ex. 5, pp. 11-12).

69. *Awards and Tributes Specials*: Periodically throughout the renewal period, KTTV broadcast special tributes and award programs. Tillman testified that "awards specials are part of our way of life" in the Los Angeles community; moreover, he said, the honorees "are people who live and work in our community." (Tr. 608). Included among the special programs broadcast between March 6, 1986, and November 30, 1988, were the following:

"*The World Music Video Awards Preview*" was shown on January 1, 1987 from 8:30 to 9:00 p.m. This program profiled the musicians who had been nominated for the awards to be presented the following week (Fox Ex. 5, p. 12). This program was produced by KTTV in cooperation with News America Corporation (Tr. 432).

"*The World Music Video Awards*" aired on January 10, 1987 from 9:00 to 11:00 p.m. This program, which provided live satellite coverage of the annual awards ceremony, was produced by KTTV in cooperation with News America Corporation (Fox Ex. 5, p. 12; Tr. 432).

"*The Golden Globe Awards*" was presented on January 31, 1987 from 9:00 to 11:00 p.m. Broadcast live from Hollywood, California, this program provided coverage of the annual awards ceremony honoring the motion picture and television industries (Fox Ex. 5, p. 12).

"*The Black Gold Awards*" aired on March 7, 1987 from 11:30 p.m. to 1:30 a.m. This special covered the annual awards held in Hollywood to honor Black entertainers.

"*The Soul Train Music Awards*" was presented on March 23, 1987 from 9:00 to 11:00 p.m. Broadcast live from Hollywood, this program provided coverage of the annual awards honoring Black performers in the music industry.

"*The American Video Awards*" was shown on April 27, 1987 from 9:00 to 11:00 p.m. This program provided live coverage of the awards ceremony honoring performers in the video industry.

"*The MTV Award*" was broadcast on September 12, 1987 from 11:00 p.m. to 1:00 a.m. Telecast from Hollywood, this program provided coverage of the annual video awards ceremony.

"*The Emmy Awards Post Show*" was shown on September 20, 1987 from midnight to 12:30 a.m. This program, produced by KTTV, provided live coverage of several parties around Los Angeles following the Emmy Awards honoring the television industry.

"*The Hall of Fame Awards*" was presented on November 30, 1987 from 8:00 to 10:00 p.m. This special, produced by KTTV, provided coverage of the annual awards ceremony honoring achievement in the television industry.

"*The Clio Awards*" aired on December 2, 1987 from 8:00 to 9:00 p.m. This annual awards program, produced by KTTV, honored achievements in the television advertising industry.

"*The Soul Train Music Awards*" aired on March 30, 1988 from 8:00 to 10:00 p.m. This program provided live coverage of the annual awards ceremony honoring performances and achievements by Black performers in the music industry.

(Fox Ex. 5, pp. 12-13).

70. *Charitable Fundraisers*: During the renewal period, KTTV provided airtime and made its facilities available for production and broadcast of extended national and local fundraising events on behalf of charitable organizations. Examples of such special programming broadcast between March 6, 1986, and November 30, 1988, included the following:

"*Stop A Killer*" aired on June 8, 1986 from 4:00 to 10:00 p.m. Broadcast live from Los Angeles, this program solicited donations to fight leukemia (Fox Ex. 5, p. 14). This program was produced by KTTV (Tr. 433-434).

"*The Muscular Dystrophy Association Telethon*" aired from 6:00 p.m. August 31 to 3:30 p.m. on September 1, 1986. This fundraising event sought donations from individuals to help combat muscular dystrophy. In addition to national programming, the telethon also included hourly ten minute segments, hosted by local celebrities, that were produced by KTTV and broadcast from the station's studios.

"*Star-Athon '87*" and "*Star-Athon '88*" aired from 8:00 p.m. on January 17 to 6:00 p.m. on January 18, 1987 and from 10:00 p.m. on January 23 to 6:00 p.m. on January 24, 1988. This program included national as well as locally produced segments soliciting donations to fight cerebral palsy (Fox Ex. 5, p. 14). The local segments were produced by KTTV (Tr. 434).

"*Six Hours For Life*" aired on August 8, 1987 from noon to 6:00 p.m. This national telethon, which included local segments produced by KTTV, sought funds to benefit the Leukemia Society of America.

(Fox Ex. 5, p. 14).

Children's Programs

71. During the renewal period, KTTV broadcast programming of special interest to children. In addition to regularly scheduled and special children's entertainment programming, KTTV broadcast the following programs specifically addressed to the interests and concerns of children:

72. "*Dr. Science*:" A 30-minute, locally produced children's program broadcast Saturday mornings at 11:00 a.m. between September 19, 1987, and February 27, 1988. The program's title character, a humorous science professor, used an entertaining, engaging format to inform and educate children about basic scientific concepts. "Dr. Science" won a 1987 local Emmy Award for Best Program, Children/Youth -- Independent Stations (Fox Ex. 7, p. 1).

73. "*Kidsongs*:" A 30-minute program broadcast Saturday mornings at 7:30 a.m. between September 1987 and November 30, 1988 (Tr. 404). "Kidsongs presented traditional children's songs performed by children in music video-like sequences. The program, hosted by children, was based on the premise that children had discovered an abandoned television station, which they used to stage performances of their favorite children's songs. Children were shown each week in the "station's" control room, operating equipment and producing the program (Fox Ex. 7, p. 1).

74. "*It's a Good Sign*:" A locally produced series of thirty and sixty second segments designed to teach hearing children simple signs used by the hearing-impaired. The series, which featured a hearing impaired person signing and speaking selected words in the basic sign language vocabulary, was intended to improve communication between hearing and hearing-impaired children and to give hearing children a better understanding of some of the problems faced by the hearing-impaired (Tr. 600-602). The 105 individual segments of "It's a Good Sign" were broadcast on an ongoing basis between March 1986 and January 1988 (Fox Ex. 7, p. 2). Segments typically were broadcast during children's viewing hours, between 7:00 and 9:00 in the morning or between 3:00 and 5:00 in the afternoon (Tr. 601).

75. "*Have You Ever Wondered*?" A locally produced series of program segments, ranging in length from 30 to 60 seconds, designed to address children's curiosity about the world around them, and often responding to actual questions submitted by KTTV viewers -- for example, "Why is grass green?" and "How do planes fly?" The 250 individual segments of "Have You Ever Wondered?" were broadcast on an ongoing basis between March 6, 1986, and November 30, 1988. "Have You Ever Wondered?" won a 1986 local Emmy Award for Best Program for Children/Youth -- Independent Stations. "Have You Ever Wondered?" was nominated for a 1987 Emmy Award for Best Program for Children/Youth -- Independent Stations. (Fox Ex. 7, p. 2). Both "It's a Good Sign" and "Have You Ever Wondered," like other short-form programming (*see supra*, at ¶ 38), ran on different schedules as either program material or public service announcements (Tr. 560-561, 570-571). The segments of "It's a Good Sign" and "Have You Ever Wondered" broadcast in public service times are tallied in Fox Exhibit 8.

Public Service Announcements

76. During the renewal period KTTV made time available throughout its broadcast day for the presentation of Public Service Announcements (PSA). PSAs afforded local and national community, charitable, civic and other organizations, as well as local government agencies, an opportunity to reach residents of KTTV's service area with messages of public interest (Fox Ex. 8, p. 1).

77. KTTV broadcast both self-contained, video-taped messages and voiceover "bulletin board" messages. PSA lengths generally varied from 10 to 60 seconds. Each month during the renewal period, videotaped PSAs and hard copy voiceover messages were submitted to KTTV, and were reviewed by the station's Public Affairs Director, who also supervised the scheduling of PSAs (Fox Ex. 8, p. 1).

78. KTTV distributed a brochure entitled "KTTV Public Affairs Guide containing information regarding the station's PSA acceptance policy and technical requirements, as well as a list of "11 Tips to Succeed" in making an effective PSA. (A copy of this brochure was attached to Fox Exhibit 8 as Attachment A). KTTV's Public Affairs Director also made periodic presentations to representatives of community organizations and local government agencies to offer advice on creating effective public service messages and gaining access to airtime for those messages on KTTV and other local television stations (Fox Ex. 8, p. 1).

79. KTTV also made its facilities and personnel available throughout the renewal period for the production of public service messages. The station's Public Affairs Director worked with local organizations to conceive and design public service campaigns. She also assisted in the production of PSAs by writing scripts, arranging for talent, and producing, directing and editing public service spots, using the station's technical facilities. KTTV also made and distributed duplicate copies of PSAs, free of charge, for broadcast by other Los Angeles television stations (Fox Ex. 8, p. 2).

80. *PSA Production Assistance Provided by KTTV, March 6, 1986 - November 30, 1988*: During the renewal period KTTV provided facilities for, and produced or assisted in the production of the following Public Service Announcements:

March 6, 1986 through December 31, 1986

"Officer Byrd" PSA for the Los Angeles Unified School District.

"WE TIP," 8 PSAs covering Crimes Against Children, Drug Pushers and Forest Fires. Kent McCord was celebrity talent.

"RECORDING FOR THE BLIND," produced for Recording for the Blind. Jane Wyatt was celebrity talent.

"BEVERLY HILLS SAINT PATRICKS DAY PARADE," 4 celebrity PSAs promoting the City's annual St. Patrick's Day Parade.

"BRUIN & TROJAN SUPER STAR CLASSIC," PSA for annual disabled children fundraiser.

"OPEN HOUSE AT THE HOLLYWOOD BOWL," "WINNER SUBSCRIPTION SERIES," 30-second and 50-second PSAs for the Los Angeles Philharmonic.

"WOMEN IN SHOW BUSINESS," 10-second and 30-second PSAs for Crippled Children's Society event to raise money to provide plastic surgery for children with disfiguring birth defects. Rose Marie was celebrity talent.

"AIDS TESTING PROGRAM," 30-second PSA for Edelman Health Center.

"FREE AIDS COUNSELING SERVICE," 30-second PSA for Shanti Foundation's services for people with AIDS and their families.

"SPECIAL COLLEGE CREDIT CLASSES," 10-second and 20-second PSAs for Los Angeles City College Homebound Program, promoting special college program that provides credit classes for disabled students.

"OFFICER BYRD," 14 PSAs for Los Angeles Unified School District; two versions of series of safety spots were completed, one for KTTV and one generic for all Fox stations.

"MAGIC POLICEMAN," 6 PSAs for Santa Monica Police Department, series of safety spots featuring policeman and his magic tricks.

"DICKERSON'S RANGERS," 30-second and 60-second PSAs for L.A. City Department of Recreation and Parks, inviting youngers to join Eric Dickerson's Rangers, an after school club at the parks that promoted drug free fun.

"ROYCE HALL," 30-second PSA produced for the UCLA Center for the Arts to promote Royce Hall's 1986-1987 season.

"ABILITIES FAIR," 10-second and 30-second PSAs for the Disabilities Awareness Committee annual event. Celebrity talent was Christopher Templeton, disabled actress.

"JAPANESE-AMERICAN CULTURAL CLASSES," 30-second PSA for Japanese-American Cultural & Community Center. Talent was a former Ms. Neisei.

"SAFE HALLOWEEN," 30-second PSA for Los Angeles City Recreation and Parks Department, inviting youngsters to celebrate Halloween at a local park, where special programs were offered.

"LOW COST CANCER SCREENING," 30-second PSAs for CANCER DETECTION CENTER.

"WOMEN'S CAREER OPTIONS CONFERENCE," 30-second PSAs for the Career Planning Center.

"TEEN PREGNANCY," PSAs produced by Fox for children's Defense Fund.

"MOMMY DON'T," PSAs for the March of Dimes. KTTV helped to develop those spots which addressed preventable birth defects caused by smoking, alcohol and drugs.

"CHILDREN'S FESTIVAL OF THE ARTS," PSA produced for the Hollywood Arts Council.

"SAFETYBELT SAFE[SM] WALKATHON," PSA produced to kick off Child Passenger Safety Week for the Los Angeles Area Child Passenger Safety Association.

January 1, 1987 through December 31, 1987

"ANNUAL DINNER," 30-second PSA produced for Para Los Ninos to publicize their annual fundraising dinner benefiting their Skid Row School. Tom Skerritt was celebrity talent.

"TEENLINE," 30-second PSA promoting hotline for teens.

"WORLD'S GREATEST WORKING TRUCK SHOW," 30-second and 10-second PSAs produced for the Crippled Children's Society fundraiser. Celebrity talent was Lee Meriweather and Jameson Parker.

"LITERACY HOTLINE," 30-second PSA for the Los Angeles County Library.

"HOLLENBECK SALUTES THE DODGERS," 30-second Spanish and 30-second English PSAs produced for the Hollenbeck Youth Center.

"TOM SULLIVAN'S ST. PATRICK'S DAY 10K RUN," 4 30-second PSAs produced for the Blind Children's Center. Tom Sullivan was the celebrity talent.

"BURN CENTER," PSA produced for Alicia Ann Ruch Burn Center.

"MADD," bilingual spots produced for the Los Angeles Mothers Against Drunk Driving, featuring Rita Moreno as the celebrity talent.

"BLACK ADOPTIONS FESTIVAL," 30-second PSA produced for the Adoption Division of the Los Angeles County Department of Children's Services.

"RECRUITMENT," 30-second bilingual PSAs produced for the Los Angeles County Department of Public Social Services, recruiting for bilingual Social Service Workers.

"LEGAL SERVICES," 30-second PSA produced for Bet Tzedek Legal Services providing free legal services to needy persons.

"RECRUITMENT," re-edited PSAs for U.S. Naval Sea Cadets.

"THIRD ANNUAL HOLLYWOOD BUSINESS EXPO," PSA produced and distributed for the Hollywood Chamber of Commerce.

"STRIKE UP FRIENDSHIPS, NOT MATCHES," re-edited PSA for the Los Angeles City Fire Department.

"SCOUTING FOR THE HANDICAPPED," re-edited 30-second PSA for the Los Angeles Chapter of Scouting for the Handicapped.

"PROM NIGHT," 20-second, 30-second and 60-second PSAs produced for Mothers Against Drunk Driving (MADD).

"FREE ARTS CLINIC," PSA for organization which brings artists, actors, volunteers together to teach abused children how to express themselves through art.

"FOR KIDS' SAKE," re-edited 36 PSAs.

"OFFICER BYRD," 14 PSAs produced for Los Angeles Unified School District.

6 PSAs produced for the Santa Monica Police Department.

6 PSAs produced for the March of Dimes.

"HOT STUFF," PSA campaign on burn prevention presented by Department of Water & Power.

"CHILDREN'S SUMMER FESTIVAL," 30-second and 60-second PSAs produced to publicize the Festival sponsored by the Hollywood Bowl.

"JACKIE ROBINSON EXHIBIT," 30-second, 10-second and 20-second PSAs produced for the Afro-American Museum.

"SHOWTIME AIDS FUNDRAISER," 30-second PSA produced for the Shanti Foundation.

"TEEN CANTEEN," 30-second PSA produced for the Teen Runaway Daytime Drop-In Center.

"SENIOR CITIZEN SAFETY BROCHURE," 30-second PSA produced for the U.S. Consumer Product Safety Commission.

"ROYCE HALL CENTER FOR THE PERFORMING ARTS," 30-second PSA produced for UCLA.

"DA CAMERA SOCIETY," 30-second PSA produced for Mount St. Mary's College, providing chamber music concerts at historical sites through the city.

"SAFE," 20-second and 30-second PSAs produced for the Orange County Foster Homes Program.

"PREGNANT TEEN SHELTER," 30-second PSA produced for St. Anne's Maternity Home to publicize their shelter/school for pregnant teens.

"AIDS HOTLINE," 30-second PSA produced for Rev. Carl Bean and the Minority Aids Project.

"BUCKLEBEAR^{R}," 30-second and 20-second PSAs produced for Los Angeles Child Passenger Safety Association, to publicize seat belt safety for children.

"CAREER EXPO -- WOMEN'S EMPLOYMENT OPTIONS CONFERENCE," 30-second PSA produced for the Career Planning Center.

"OLYMPIC ARTS FESTIVAL REVIVAL," 30-second PSA produced for the Los Angeles Festival.

"LOS ANGELES OPERA," 30-second PSA.

"LOS ANGELES PHILHARMONIC ASSOCIATION," 30-second and 30-second PSA produced featuring Andre Previn and Roger Bobo.

"MOMMY DON'T," localized 8 PSAs for the March of Dimes series.

January 1, 1988 through November 30, 1988

"LIEU CAP GENERAL AWARENESS," 30-second and 60-second PSA for the Low Income Elderly United Community Assistance Program.

"VALLEY SHELTER," 30-second and 60-second PSA, for the Valley Shelter for the Homeless.

For the HOMELESS PROJECT:

"WILLOWBROOK FAMILY SHELTER," 30-second PSA

"LONG BEACH FAMILY SHELTER," 30-second and 60-second PSAs

"GRAMMERCY PLACE," 30-second and 60-second PSA

"ZAHN MEMORIAL CENTER," 30-second and 60-second PSA, featuring Bill Redeker.

"RUMMAGE SALE," 20-second spot for Junior League of L.A., promoting its event to raise money to be distributed to community projects.

"CALIFORNIA MUSEUM OF SCIENCE AND INDUSTRY," 4 30-second and 2 60-second PSAs, featuring Tiffany Brisette, publicizing Children's I.D. Day, giving parents an opportunity to have their kids videotaped for identification purposes.

"JUST SAY NO," 30-second and 2 10-second PSAs produced for the Los Angeles Department of Recreation and Parks, featuring Dan Schneider, Dan Frischman, Brian Robbins, Steve Williams, Dean Butler, Stacey Okanowski.

"JOB FAIR," 30-second PSA produced for the Los Angeles Urban League.

"GENERIC," 30-second PSA produced for the Los Angeles Urban League.

"EL RESCATE," 2 30-second PSA's, featuring Esai Morales, seeking volunteers and promoting legal aid and social services for Central American refugees.

"SOUTHWEST MUSEUM," reedited 30-second and 60-second PSAs, promoting exhibits, demonstrations and classes at Los Angeles' oldest museum.

"SEAT BELT SAFETY" and "DRIVING UNDER THE INFLUENCE," 2 10-second and 2 30-second PSAs produced for the Los Angeles Chapter of the National Safety Council featuring Claude Akins as the talent.

"FOR KID'S SAKE," 30-second PSA produced for the Children's Art festival.

"WE TIP," 10 PSAs, 4 on welfare fraud, marijuana growers, 6 on "Rock Drug Free, featuring Argentina Rock Star Gustavo Alarco.

"DODGER HOME RUN," 2 30-second PSAs produced featuring Vin and Sandy Scully, for the Exceptional Children's Foundation.

(Fox Ex. 8, pp. 2-9).

81. *PSAs Broadcast by KTTV, March 6, 1986 - November 30, 1988*: A compilation of the local, regional, state and national organizations on whose behalf KTTV broadcast PSAs during the renewal period, and the number of PSA aired for each organization, is provided in Fox Exhibit 8, pp. 10-151.

82. Between March 6 and December 31, 1986, KTTV broadcast 8,008 PSAs (approximately 26 per day), of which approximately 88% ran between 6:00 a.m. and 12:00 midnight. During this period, PSAs were broadcast on behalf of 319 different organizations. In 1987, KTTV broadcast 9,928 PSAs (approximately 27 per day), of which approximately 81% ran between 6:00 a.m. and 12:00 midnight. During 1987, PSAs were broadcast on behalf of 377 different organizations. Between January 1 and November 30, 1988, KTTV broadcast 9,264 PSAs (approximately 27 per day), of which approximately 76% ran between 6:00 a.m. and 12:00 midnight. During this period, PSAs were broadcast on behalf of 336 different organizations. (Fox Ex. 8, pp. 10-151).

Editorials

83. From March 6, to November 28, 1986, KTTV broadcast editorial comments and public responses on a wide range of local issues of concern to viewers in its service area (Fox Ex. 6, p. 1; Tr. 592). KTTV maintained an Editorial Board to administer the editorial process. The Board, which comprised a cross section of the Los Angeles community in terms of race, ethnicity, gender, culture and geography, had responsibility for both the subject matter and content of editorials (Fox Ex. 6, p. 1; Tr. 590-591). Tillman testified that members of the public were included on the Editorial Board because KTTV believed it was important to have input from various segments of the community regarding the selection of topics for editorials (Tr. 590). KTTV's Editorial Director, Program Director and General Manager attended and participated in the Editorial Board's semi-monthly meetings (Fox Ex. 6, p. 1).

84. KTTV's Editorial Director was responsible for initially drafting editorial comments at the direction of the Editorial Board. The Editorial Board then edited the copy, which was ultimately reviewed and edited for purposes of stylistic presentation by KTTV's General Manager. Upon final substantive approval by the Board and stylistic review by the General Manager, editorials were delivered by the General Manager and taped for subsequent broadcast (Tr. 489-490, Fox Ex. 6, p. 1).

85. Station editorials, which were normally 60 to 90 seconds long, depending on the subject matter, were broadcast up to ten times per week (Tr. 591; Fox Ex. 6 p. 1). Responses were encouraged, and were accepted by mail and by telephone. Citizen requests to deliver over-the-air responses were granted if, in the judgment of the Editorial Board, the advocate fairly represented a cross section of the community. Approved responses were aired the same number of times as the original editorial, during the same dayparts (Fox Ex. 6, p. 1).

86. Fox Exhibit 6 contains a comprehensive list of editorials broadcast during the renewal period. The following are representative examples of the editorials included in the exhibit:

CITY OF SANCTUARY

Air Dates: 3/10, 3/11, 3/12, 3/13, 3/14, 3/16, 3/24, 3/25, 3/26, 3/27, 3/28 and 3/29, 1986

Topic: KTTV proposed a change in the federal government's immigration policy towards Guatemalan and Salvadoran nationals living in Los Angeles. The proposal would classify these individuals as political refugees.

"YES" ON PROPOSITION 52

Air Dates: 4/29, 4/30, 5/1, 5/3, 5/5, 5/6, 5/9, and 5/11, 1986

Topic: This editorial endorsed Proposition 52, the County Correctional Facility Capital Expenditure Bond Act of 1986, a funding proposal for the construction and renovation of county prison facilities.

EDUCATION AND THE LOTTERY

Air Dates: 5/12, 5/13, 5/15, 5/16 and 5/17, 1986

Topic: This editorial supported a legislative proposal to allow California lottery proceeds to be used for the construction of new schools and for the purchase of textbooks, computers, and other educational materials.

YES ON PROPOSITION 43

Air Dates: 5/19, 5/21, 5/23, 5/26, 5/27 and 5/28, 1986

Topic: KTTV endorsed a legislative proposal to appropriate funds to the county and city of Los Angeles for the preservation and expansion of parks and recreational facilities.

STOP POISONING OUR CHILDREN

Air Dates: 6/3, 6/5, 6/7, 6/10, 6/11, 6/13 and 6/15, 1986

Topic: KTTV endorsed proposed legislation to create lead screening programs for children who are determined to be at risk for lead poisoning.

THE INNOCENT POOR

Air Dates: 6/3, 6/4, 6/6, 6/9, 6/11 and 6/12, 1986

Topic: KTTV criticized an ordinance enacted by the Los Angeles County Board of Supervisors requiring emergency shelters to fingerprint and photograph all persons utilizing their services who do not possess valid identification.

THE HISPANIC COUNT

Air Dates: 6/4, 6/5, 6/9, 6/10 and 6/13, 1986

Topic: In an effort to guarantee fair representation of the Hispanic and Asian-American communities on the Los Angeles City Council, KTTV proposed that City Council redistricting plans take into account the total population of a given area rather than the total number of registered voters.

AUTO INSURANCE CLAIMS

Air Dates: 6/16, 6/17, 6/19, 6/20, 6/24, 6/25, 6/27 and 6/28, 1986

Topic: KTTV endorsed a proposal to conduct a legislative investigation into the alleged negligence of the California Department of Insurance in regulating insurance companies.

ENGLISH, THE OFFICIAL LANGUAGE

Air Dates: 7/1, 7/2, 7/3, 7/4, 7/7, 7/9, 7/10 and 7/11, 1986

Topic: KTTV opposed a proposed constitutional amendment to make English the official language of California, arguing that the measure could cause further rifts in California's multiracial society.

POLICE GARBAGE FEES

Air Dates: 7/28, 7/29, 7/31, 8/3, 8/4, 8/6, 8/7 and 8/9, 1986

Topic: KTTV opposed a proposal to raise garbage collection fees in order to generate revenue to hire an additional 1500 police officers. KTTV argued that the proposed fee increases were too large and inequitable, in that businesses and residents employing private garbage collection services would not be required to contribute to the funding of added police protection.

PREVENT AIDS NOW

Air Dates: 8/11, 8/12, 8/17, 8/18, 8/20, 8/21, and 8/23, 1986

Topic: Arguing that Acquired Immune Deficiency Syndrome (AIDS) has not been determined to be a communicable disease, KTTV opposed Proposition 64. The measure would define AIDS as a communicable disease, thereby allowing health officials to quarantine people infected with the AIDS virus.

LOS ANGELES COUNTY VOTER REGISTRATION

Air Dates: 8/25, 8/26, 8/28, 8/31, 9/1, 9/2 and 9/3, 1986

Topic: In an anticipation of the upcoming November elections, this editorial endorsed a Los Angeles county voter registration plan mandated by Judge Jack M. Newman. The plan, unless appealed by the Los Angeles County Board of Supervisors, would require the county to solicit voter registrations in any county agency where there is heavy foot traffic.

BILINGUAL IMMERSION

Air Dates: 8/26, 8/27, 8/29, 9/1, 9/4 and 9/5, 1986

Topic: KTTV endorsed an educational program which would allow, on a voluntary basis, both English and Spanish speaking elementary school students to learn primarily in Spanish. The results of a similar program that has been operating in San Diego for the past 10 years indicate that students exit the program with fluency in both Spanish and English and perform well academically.

SAVE THE STREET SCENE

Air Dates: 11/4, 11/5, 11/6, and 11/7, 1986

Topic: In response to the outbreak of violence at the last Los Angeles "Street Scene Festival," this editorial suggested limiting the festival to daylight hours, and employing more security forces. However, the editorial opposed cancelling the Festival or banning beer and wine sales at the Festival.

(Fox Ex. 6, pp. 2-12).

Public Comments: Affidavits and Unsolicited Letters

87. KTTV received thousands of viewer letters each year during the renewal period (Tr. 460-461, 467). All letters from the general public were maintained in the station's public inspection file (Fox Ex. 9, p. 1; Tr. 467-468). Numerous unsolicited letters received during the license term reflect the community's appreciation for KTTV's public affairs, news and public service programming and community involvement (Tr. 595-596). For example, Rainbow's president, Esther Renteria, wrote twice to KTTV on the behalf of the Hispanic Public Relations Association to express her "deepest gratitude and appreciation" for KTTV's support for the Association's annual fundraising event providing scholarships for Hispanic students (Fox Ex. 9, pp. 145, 161). In addition, John Esheveste, Vice President, Telacu, and a 2% non-voting shareholder of Rainbow, wrote to commend KTTV's initiative in hosting a meeting with local community leaders "to discuss community needs, and to share suggestions as to how we can better access public service and news programming at KTTV." (Fox Ex. 9, p. 164).

88. Thirty public witnesses submitted affidavits on behalf of KTTV. The affidavits, prepared with assistance of KTTV's counsel, praised KTTV's community involvement and its public affairs, news and public service programming (Fox Ex. 9, p. 1; Tr. 516, 597). Ten of KTTV's public witnesses were cross-examined, at Rainbow's request, during a field hearing in Los Angeles (Tr. 1356-1518). The written and oral testimony of KTTV's public witnesses, and a representative sample of unsolicited letters placed in KTTV's public inspection file, are summarized below.

Public Witness Affidavits

1. *Affidavit of Nyla Arslania, President of the Hollywood Arts Council.* The Hollywood Arts Council is a not-for-profit organization which promotes the arts in Hollywood. Ms. Arslanian commended KTTV for providing "invaluable assistance to the Council and its Children's Festival of the Arts Project." In addition to writing, producing and broadcasting a "PSA" promoting the Festival, KTTV made copies of the PSA and distributed them to other Los Angeles television stations. Furthermore, KTTV donated the design and printing and assisted in the distribution of 100,000 copies of the Festival's three-language brochure. Ms. Arslanian noted that KTTV's "assistance was instrumental in promoting the Festival in underserved areas of the community." In particular, Ms. Arslanian explained that "KTTV's involvement enabled the Festival to realize its goals of reaching out to minority communities -- especially the Hispanic and Armenian communities -- which would not otherwise have been aware of many of the local cultural activities and opportunities available to them."

PSAs were broadcast on behalf of the Hollywood Arts Council in July 1987 and August 1988 (Fox Ex. 9, pp. 20-21).

2. *Affidavit of Mel Asch, Director of Public Relations of the Greater-Los Angeles Chapter National Safety Council.* Mr. Asch praised KTTV's repeated assistance to the Council, which promotes safety on the streets, highways, home and workplace. Mr. Asch lauded KTTV for being "generous with its resources" in connection with the Council's PSA campaigns. Moreover, Mr. Asch reported that KTTV "is always responsive to our needs" and praised the station's public affairs director as an individual "uniquely dedicated to helping organizations, like the Council, that work to improve the quality of life for the residents of the Los Angeles area."

Representatives of the Greater Los Angeles Chapter of the National Safety Council appeared on KTTV's "Good Day L.A." on October 4, 1986, and June 13, 1987; PSAs were broadcast on behalf of the Council in April 1986 and December 1987 (Fox Ex., 9, pp. 22-24).

3. *Affidavit of Robert Burns, General Manager of the Social Service Department of the City of Los Angeles.* The Department polices the solicitation practices of charitable organizations, with an emphasis on public education. With a small budget, the Department depends on the local media to inform citizens about questionable and fraudulent fundraising practices. Dr. Burns commented that his appearance on KTTV "was an important aspect of our ongoing efforts to educate and inform potential charitable donors in the Los Angeles area."

Dr. Burns appeared on KTTV's "Good Day L.A." on September 13, 1986 (Fox Ex. 9, pp. 25-27).

4. *Affidavit of Lawrence S. Deutchman, Director of Program Development for the Entertainment Industries Council.* The Council is a non-profit organization created and funded by the entertainment industry to heighten public awareness about issues such as substance abuse, drunk driving, automobile safety and AIDS. Mr. Deutchman thanked KTTV for its "very helpful" assistance in educating and informing the public about various safety issues. Mr. Deutchman's appearances on KTTV included discussions of seatbelt use and drunk driving; he stated that "KTTV's assistance enabled the Council to reach a wide audience with its message of automotive safety, which is of great importance in the Los Angeles and southern California areas, whose residents are so dependent on automobiles."

Mr. Deutchman appeared on KTTV's "Good Day L.A." on January 31 and June 13, 1987, and on KTTV's "Speak Out" on May 30, 1987 (Fox Ex. 9, pp. 28-29).

5. *Affidavit of Nancy Rose Dufford, Director of Public Relations for Big Brothers of Greater Los Angeles.* Ms. Dufford thanked KTTV for being "very supportive" of Big Brothers, an organization that matches fatherless boys with adult male volunteers throughout the greater Los Angles area. Ms. Dufford praised "the station's generous cooperation" as "invaluable to Big Brothers and the young people" it serves.

(a) In a letter dated March 5, 1987, Ms. Dufford thanked KTTV for its support of the organization's Bachelor Auction, which raised nearly $40,000. She noted that "[i]t was a huge success and that success is largely due to the information you [KTTV] provided to the public . . . ."

(b) In a letter dated July 24, 1987, Ms. Dufford thanked KTTV for the station's gift of 50 circus tickets, declaring that KTTV's "special attention and generosity indicates a sensitivity to the growing need for the services Big Brothers offers."

(c) Letter dated September 1, 1987, from Big Brother Volunteer to KTTV, thanking KTTV for the donation of circus tickets.

(d) Letter dated September 1, 1987, from Christopher Ng, "little brother," to KTTV, thanking KTTV for the tickets to the circus.

(e) Letter dated August 11, 1988, from Ms. Dufford to KTTV, thanking KTTV for its gift of 53 complimentary circus tickets.

Big Brothers Volunteers and their "little brothers" appeared on KTTV's "Good Day L.A." on June 7 and 11, 1986, December 6, 1986, and June 20, 1987; PSAs were broadcast on behalf of the organization from March through June 1986, December 1986 through June 1987, and August 1987 through September 1988 (Fox Ex. 9, pp. 30-36).

6. *Affidavit of Marla Gibbs, Founder and Chairman of the Board of Concerned Helpers of Inner Community Endeavors (CHOICE).* CHOICE, an organization that raises funds for a variety of community-based organizations serving the residents of Los Angeles, sponsors an annual gala fundraising event. The proceeds of the event have benefitted organizations providing college scholarships and hands-on vocational training for young people, support for AIDS patients, and services for the elderly and homeless. Ms. Gibbs noted that KTTV's promotion of the Spring 1987 event "was crucial to our ability to inform the public about CHOICE and its work and promote that year's benefit."

Ms. Gibbs appeared on KTTV's "Good Day L.A." on January 17, 1987 (Fox Ex. 9, pp. 37-38).

7. *Affidavit of Al Goldfarb, Director of Public Relations for Los Angeles City Recreation and Parks Department.* The Department, whose programs serve all segments of the community, has no promotion budget and a very small public relations staff, and therefore necessarily relies on the public service efforts of the local media to publicize its programs. Mr. Goldfarb commended KTTV for its assistance, observing that "KTTV has truly been a friend to the Department by helping us get our message to the public despite a shortage of funds. The station believes in our Department's programs, and is genuinely concerned about the people they serve." As an example of KTTV's assistance to the Department, Mr. Goldfarb noted that its "Just Say No To Drugs" PSAs -- written, produced and broadcast by KTTV, and distributed free of charge by KTTV to other local stations -- were so successful that the "Department was literally swamped with calls in response to the announcements....KTTV's promotional efforts were a significant contribution to the success of the program...."

(a) In a letter dated June 5, 1986, James Hadaway, General Manager of the Los Angeles City Recreation and Parks Department, thanked KTTV for outstanding public service support of the City's anti-drug campaign, "Just Say No To Drugs." The cooperation of KTTV in "helping get the word out to young

people about the dangers of drug abuse" was noted by Mr. Hadaway: "KTTV-TV has done an exemplary job of communicating the problem to your many young viewers."

"Just Say No To Drugs" PSAs were broadcast on KTTV from May 1986 through November 1987; a Safe Halloween PSA was broadcast in October 1986, and PSAs promoting the Los Angeles Zoo and Observatory appeared from March 1986 through November 1988 (Fox Ex. 9, pp. 39-42).

8. *Affidavit of Eva Hain, Director of Public Information for the Los Angeles Unified School District (LAUSD).* Ms. Hain explained that the size of LAUSD, with eight hundred schools, often makes it very difficult to publicize effectively its programs and policies. Ms. Hain noted that "KTTV sought to address this problem by devoting considerable time, effort, and airtime to issues important to the LAUSD and its constituents." Ms. Hain lauded KTTV's efforts: "[t]hrough its public affairs programming and public service announcements, as well as its regular news coverage of education issues, KTTV has provided an invaluable service to the LAUSD and to the community we serve."

(a) In a letter dated April 7, 1986, Patricia Prescott Marshall, Administrative Coordinator for LAUSD, wrote to thank KTTV for airing "CHOICES '86." Ms. Marshall stated, "[b]ecause of your station's cooperation, many more parents in the community had an opportunity to view the show with their children and to learn about the [available] educational options . . . ."

LAUSD PSAs were broadcast on KTTV from September 1986 through November 1988; LAUSD officials appeared on KTTV's "Midday Sunday" in October 1987; a special, "CHOICES," produced by LAUSD, was broadcast by KTTV on March 15 and 19, 1986, March 14, 1987, and March 20, 1988 (Fox Ex. 9, pp. 43-46).

9. *Affidavit of Daniel Hernandez, Executive Director of the Hollenbeck Police Business Council (HPBC).* HPBC, which is affiliated with the Los Angeles Police Department, addressed youth problems, with a particular emphasis on the East Los Angeles community. Mr. Hernandez noted that "KTTV responded with great enthusiasm to HPBC's requests for assistance." KTTV's PSAs for HPBC's annual fundraising dinner -- both English and Spanish versions -- were written, produced and broadcast by KTTV, which also distributed them, free of charge, to other area stations. Mr. Hernandez stated that "[t]he substantial success of this fundraiser, which benefitted the HPBC's youth center programs, would not have been achieved without KTTV's promotional efforts." Under cross-examination, Mr. Hernandez emphasized that KTTV's technical assistance, and its help in getting members of the Los Angeles Dodgers, including manager Tommy Lasorda, to appear in the PSAs was "terrific." Mr. Hernandez explained that "coming from a neighborhood that really doesn't deal with corporate America, to me, that was something that a person went out of their way to do . . . ." (Tr. 1452).

(a) Letter dated February 12, 1987, from Daniel Hernandez to KTTV, thanking KTTV for its efforts to make its 1987 fundraiser a success. Mr. Hernandez stated that "[t]he 1987 Dodger Salute; indeed, all our fundraisers, could never reach successful culminations without YOU. *YOU* are recognized by me as being an extremely vital resource of the Hollenbeck Youth Center -- a true, hard-working and dedicated FRIEND!"

PSAs were broadcast in support of the Council in February 1987 (Fox Ex. 9, p. 47-48; Tr. 1452).

10. *Affidavit of Diane Jacoby, Executive Director of El Rescate.* El Rescate provides a wide range of legal and social services to Central American refugees in the greater Los Angeles area. KTTV's creation, production, broadcast and distribution of PSAs was praised by Ms. Jacoby as providing "crucial support for El Rescate's activities." Ms. Jacoby also appreciated the time that KTTV's public affairs director took to teach El Rescate how to write and produce its own PSAs. Ms. Jacoby stated: "In short, by reaching out to our organization, KTTV enabled El Rescate better to serve the needs of our community's Central American refugees."

(a) Letter dated September 12, 1988, from Ms. Jacoby to KTTV thanking the station for writing, producing and broadcasting PSAs, as well as for proving "a lesson on PSAs."

PSAs describing El Rescate's activities and soliciting volunteers were broadcast on KTTV in September, October and November 1988 (Fox Ex. 9, p. 50-52; Tr. 1426).

11. *Affidavit of Willie Jordan, President of the Fred Jordan Mission.* The Mission serves the homeless by providing food and shelter, targets programs for women and children, and provides education and information services on subjects such as AIDS and child abuse. Ms. Jordan and her late husband, the founder of the Mission, "were very grateful" for the opportunity to appear on KTTV to discuss their efforts on behalf of the homeless. Ms. Jordan lauded the station's interviewer, who "transmitted his excitement about our activities to his viewers . . . ." Ms. Jordon observed that "KTTV viewers were particularly responsive to our request for warm clothing and blankets, so that our appearance was very helpful for the people we serve."

Ms. Jordan and her husband appeared on KTTV's "Good Day L.A." on February 7, 1987 (Fox Ex. 9, pp. 53-54).

12. *Affidavit of Gwen Kirk, Acting Public Information Officer for the Los Angeles County Department of Children's Services (DCS).* DCS provides Los Angeles area children with protective services, foster care and adoption placement. DCS is "deeply appreciative" of KTTV's assistance in promoting and publicizing DCS's activities, particularly because "[h]igh levels of public awareness and community involvement are critical to the success of DCS's activities." In particular, Ms. Kirk cited the "Eleven's Kids" segments broadcast on KTTV, which introduced KTTV viewers to children eligible for adoption, particularly hard to place children, and resulted in an extremely high adoption rate. Other assistance noted by Ms. Kirk as examples of "KTTV's ongoing commitment to inform viewers about children in need of adoption" were the station's writing, producing and broadcast of a PSA promoting DCS's Black Adoptions Festival, and its news coverage of that event. Ms. Kirk observed that "[s]upport and cooperation such as

that provided by KTTV was of crucial help to the Department's success in providing adoptive homes for the children under our care."

(a) In a letter dated May 20, 1987, Wini Jackson, Community Affairs Officer, DCS, wrote to thank KTTV with "great appreciation" for publicizing the Black Adoption Festival, which, with KTTV's help, resulted in over 350 persons meeting children available for adoption. Ms. Jackson noted: "It took your media outreach, combined with our Department's information to put the message out there in a tasteful and precious manner. Together, you and the Department . . . are the Public Relations Team for these children."

Approximately 15 "Eleven's Kids" segments were broadcast on KTTV's "Good Day L.A." from June 1986 through August 1987 (Fox Ex. 9, p. 55-58).

13. *Affidavit of Kats Kunitsugu, Executive Secretary of the Japanese-American Cultural and Community Center (JACCC).* Ms. Kunitsugu praised the "effective assistance from KTTV" on behalf of JACCC, and for "Nisei Week" a summer festival celebrating Japanese culture and heritage. Ms. Kunitsugu noted the "great cooperation from the station in publicizing" Nisei Week, as well as the PSA written, produced and edited by KTTV's public affairs director for JACCC's classes in traditional Japanese music and culture. Ms. Kunitsugu explained that the PSAs "received heavy play over KTTV" and were so "tremendously successful in generating interest in our classes" that JACCC's classes were oversubscribed.

Ms. Kunitsugu appeared on KTTV's "Good Day L.A." on August 2, 1986; PSAs publicizing JACCC's classes in traditional Japanese culture were broadcast in November 1986 (Fox Ex. 9, pp. 59-60).

14. *Affidavit of Lorraine Lawrence, Regional Director of Public Affairs for the United States Consumer Product Safety Commission (CPSC).* Ms. Lawrence observed that "KTTV enthusiastically supported the CPSC's efforts to promote product safety in the Los Angeles area." Her television appearances on KTTV "greatly enhanced my ability to effectively inform the community about potentially dangerous consumer product," Ms. Lawrence reported. Ms. Lawrence also appreciated that "KTTV took the initiative in promoting consumer product safety" and characterized KTTV's production of a PSA as "just one example of the ongoing collaborative relationship that I enjoyed with KTTV and that resulted in increased community awareness of the issue of product safety."

(a) In a letter dated August 27, 1987, Ms. Lawrence expressed her gratitude to KTTV for producing a PSA on safety for older consumers. Ms. Lawrence added that "CPSC is fortunate to work with you."

Ms. Lawrence appeared on KTTV's "Good Day L.A." in November 1987, and on KTTV's "Midday Sunday" in January 1988; PSAs regarding home safety for senior citizens were broadcast on KTTV between October 1987 and August 1988 (Fox Ex. 9, pp. 61-63).

15. *Affidavit of Dr. Elaine Leader, Program Coordinator for Teen Line.* Teen Line, affiliated with Cedars-Sinai Medical Center, provides counseling and referrals for young people seeking help and support, and distributes information on suicide and drug abuse prevention. Dr. Leader credited the PSA produced and edited by, and "prominently featured" on KTTV, as "instrumental in getting Teen Line's message to young people in the Los Angeles area." Dr. Leader concluded: "We know from routine follow up by our teen 'listeners' that many of the young people seeking help from Teen Line learned of it from the announcements broadcast over KTTV."

(a) Letter dated January 27, 1987, from Dr. Leader to KTTV, thanking the station for "all the effort you have expended in taping a public service announcement for TEEN LINE." Dr. Leader stated, "[y]our interest and concern for high quality production has really made the difference for the achievement of an excellent result."

(b) Letter dated February 19, 1987, from Terry Lipton, President, Board of Directors, and Dr. Leader, to KTTV, thanking the station for the production of a new PSA.

In January 1987, KTTV produced, edited and broadcast a PSA publicizing Teen Line, and prominently featured on KTTV a PSA featuring Teen Line volunteers in February, June, September and October 1987, and March 1988 (Fox Ex. 9, pp. 64-67).

16. *Affidavit of Judy Lewis, Executive Director of the "Make a Wish" Foundation.* The "Make a Wish Foundation" works with Los Angeles area medical centers to grant the wishes of children suffering from life-threatening illnesses. Ms. Lewis credited her appearance on KTTV promoting the Foundation's celebrity tennis benefit with contributing to its success.

Ms. Lewis appeared on KTTV's "Good Day L.A." on May 2, 1987 to discuss Make a Wish Foundation and the tennis benefit (Fox Ex. 9, pp. 68-69).

17. *Affidavit of Meg McDonald, proprietor of McDonald Media Services, a public relations service for a number of Los Angeles non-profit community organizations.* Ms. McDonald commended KTTV for its "generous support" on behalf of the Los Angeles County Fair through appearances of Fair representatives on KTTV: "KTTV's efforts on behalf of the Fair were crucial to its ability to generate interest among the residents of Los Angeles and southern California."

Fair Representative Leonard Harper, along with a 4-H Club member and her pet lamb, appeared on KTTV's "Good Day L.A." on September 13, 1986. On September 20, 1986, Fair Representative Sid Robinson and another 4-H Club member with her seeing eye dog appeared on "Good Day L.A." On August 29, 1987, Sid Robinson appeared on "Good Day L.A." to discuss the Fair and on September 5, 1987, Fair Exhibits Manager Nadine Lowery was a guest on "Good Day L.A." (Fox Ex. 9, pp. 70-72).

18. *Affidavit of Jackie Moffett, Board Member of the Festival of Arts of Laguna Beach.* The Festival is a nonprofit organization that fosters the performing and visual arts in southern California. Ms. Moffett, citing to appearances on KTTV, stated that "KTTV's interest in our activities and its willingness to provide a vehicle for us to promote them were an important part of the success of the Festival and are very much appreciated.

(a) In a letter dated September 1986, Sally Reeve, Public Relations Director, Festival of Arts of Laguna Beach, wrote to thank KTTV for publicizing the Festival through the broadcast of PSAs, and stated that the station's efforts "helped to make our season a grand success."

On July 26, 1986, Jack Archer, the Festival's Director of Exhibits, appeared on KTTV's "Good Day L.A."; on July 4, 1987, Ms. Moffett appeared on "Good Day L.A." to discuss the Festival and Pageant (Fox Ex. 9, pp. 73-75).

19. *Affidavit of Jan Napolitan, Co-Chair of "Art for Fun's Sake" Sponsored by the Palos Verdes Community Art Association.* The Association, a non-profit organization that works to enrich the cultural life of the community, sponsors an annual fine arts and craft show as its principal fundraising vehicle. Ms. Napolitan's appearance on KTTV was "very helpful" in generating public awareness of, and interest in, the Association's activities. Ms. Napolitan observed that "[w]e heard from KTTV viewers from as far away as San Diego and received many calls from Los Angeles area residents seeking information about the festival and expressing an interest in attending."

Ms. Napolitan and Maudette Ball, the Executive Director of the Association, appeared on KTTV's "Good Day L.A." on October 11, 1986, to discuss the upcoming "Art for Fun's Sake" festival (Fox Ex. 9, pp. 76-77).

20. *Affidavit of Carlton Norris, Manager of Community Affairs for ARCO, and of "Save the Books" Campaign (the Campaign), Co-sponsored by ARCO and the City of Los Angeles.* The Campaign's goal is to rebuild the collection of the Los Angeles City Central Library in the aftermath of a disastrous fire. Mr. Morris praised the opportunity to appear on KTTV to promote the Campaign and noted that "[a]ppearances such as this were a valuable part of our efforts to attract not only major institutional support, but also contributions from individual donors."

Mr. Norris and Betty Gay, Director of the Los Angeles City Central Library, appeared on KTTV's "Good Day L.A." on November 29, 1986, to discuss the library fire and promote the Campaign (Fox Ex. 9, pp. 78-79).

21. *Affidavit of John Ochoa, Executive Director of the Greater Los Angeles Partnership for the Homeless.* The Partnership is a coalition of corporate, business, and community leaders working to eradicate homelessness in the Los Angeles area. KTTV and the Partnership collaborated in the development of a 3-hour prime time special designed to raise public awareness about homelessness. Mr. Ochoa explained that "KTTV produced, promoted and broadcast the program entirely at its own expense, thereby allowing the Partnership to distribute all of the proceeds [$138,000 in viewer donations] to seven local organizations that combat homelessness in the Los Angeles area." Mr. Ochoa praised KTTV's "willingness to provide this kind of leadership and support" and remarked that "KTTV's efforts positively affected the lives of many homeless people in the Los Angeles area."

(a) In a letter dated January 10, 1989, Mr. Ochoa expressed the Partnership's "heartfelt and enthusiastic gratitude" for the time, resources, and energy expended by KTTV in the development of "No Home for the Holidays."

Throughout 1988, KTTV developed, in collaboration with the Partnership, a 3-hour prime-time special, "No Home For The Holidays" (Fox Ex. 9, pp. 80-82; Tr. 544-546, 554).

22. *Affidavit of Stacy Okonowsky, former President of SHO BIZ Productions, a marketing firm specializing in community promotional events and fundraising.* Ms. Okonowsky praised KTTV's production and broadcast of PSAs benefitting the Los Angeles Blind Children's Center and the "Just Say No Youth Program of the Los Angeles City Department of Recreation and Parks. According to Ms. Okonowsky, "KTTV's involvement was integral to the substantial success enjoyed by" these events.

PSAs were produced, broadcast and distributed by KTTV in August, 1987, promoting the "Just Say No" Celebrity Auction; in March 1987, KTTV produced and broadcast PSAs promoting the Tom Sullivan St. Patrick's Day 10K Run to benefit for the Los Angeles Blind Children's Center (Fox Ex. 9, pp. 83-84).

23. *Affidavit of Christie Palmer, Public Relations Director of the Crippled Children's Society (the Society), and past President of Women in Show Business, a Los Angeles charitable organization.* Ms. Palmer acknowledged the on-air promotion for fundraising activities provided by KTTV to these two organizations. Ms. Palmer cited to the production of PSAs by KTTV, which not only broadcast the spots, but also made copies for other area television stations. The Society, which provides educational, therapeutic and rehabilitative services for disabled adults and children in the Los Angeles area, and Women in Show Business, which sponsors a Celebrity Ball to raise funds to provide reconstructive and restorative surgery for needy children, have virtually no public relations budget, and therefore, Ms. Palmer explained, must depend on the generosity and support of local media. Ms. Palmer stated that "[w]ithout cooperation and assistance such as that provided by KTTV, our efforts to generate community support for our activities would have been severely limited."

(a) In a letter dated January 26, 1987, Ms. Palmer thanked KTTV for the donation of production time and facilities to tape PSAs for the "World's Greatest Working Truck Show," benefiting the Crippled Children's Society. Ms. Palmer wrote that "[t]here aren't enough good words to describe the wonderful cooperation and treatment we received from [KTTV's public service director], who arranged the session for us, re-wrote my over-long script and pulled it all together, professionally and with great patience."

PSAs publicizing the Society's annual benefit were broadcast on KTTV in April and May 1986; in January 1987, KTTV produced three new PSAs for the Society's 1987 benefit which aired in March and April 1987; PSAs promoting the Women in Show Business Celebrity Ball were produced by KTTV in August and September 1986 and broadcast by KTTV in October 1986 (Fox Ex. 9, pp. 85-87).

24. *Affidavit of Joanne Perry, Co-Chair of the annual "Showcast House of Design" of the Claremont, California, Auxiliary of the Children's Home Society.* The Society, through auxiliaries, raises funds to provide a variety of services for children, and the Claremont Auxiliary pro-

vides funds for services including foster care, adoptions, parental counseling and sex education. With a very limited budget for promotion and publicity, Ms. Perry noted, the Society relies heavily on the generosity of local media to inform the public about its activities. Ms. Perry credited the Society's appearance on KTTV, "which reaches so many southern California residents," as "an important contribution to the success of that year's event . . . ."

On May 2, 1987, Ms. Perry and her co-chair appeared on KTTV's "Good Day L.A." to promote the Society's 1987 "Showcase House of Design" benefit (Fox Ex. 9, pp. 88-89).

25. *Affidavit of Domingo Rodriquez, Program Administrator of the Adult ESL and Amnesty Citizenship Program of the Los Angeles Unified School District (LAUSD).* LAUSD provides citizenship preparation and other educational services for individuals applying for permanent residency. Mr. Rodriquez stated that "[t]he success of our programs has been due in large part to outreach conducted over KTTV and other local television stations."

On June 5, 1988, Mr. Rodriquez appeared on KTTV's "Mid-Day Sunday" to discuss amnesty and LAUSD's citizenship programs (Fox Ex. 9, pp. 90-91).

26. *Affidavit of Carol Selkin, Public Relations Coordinator of the Southwest Museum.* The Museum, the oldest in Los Angeles County, houses Native American art and artifacts. Ms. Selkin praised KTTV's "crucial assistance" to the Museum, citing to the production of PSAs, for which "KTTV donated the services of an announcer, as well as production facilities and time...." Ms. Selkin reported that "[t]hese public service announcements resulted in new awareness of the Museum and its activities, as reflected in the numerous telephone inquiries we received from KTTV viewers."

(a) In a letter dated October 10, 1988, Ms. Selkin expressed great appreciation for KTTV's assistance in the production and broadcast of the new PSAs. Ms. Selkin noted that "[t]he best part is the response -- Immediately after you [KTTV] began running the spots, members + friends began reporting seeing it, and about 6-10 calls a day began coming in to our offices."

PSAs promoting the Museum's 80th birthday festivities were produced by KTTV and broadcast over the station from August through November 1988 (Fox Ex. 9, pp. 92-94).

27. *Affidavit of Suzanne Swanson, Director of Development for the Exceptional Children's Foundation (ECF).* ECF provides services to the developmentally disabled in Los Angeles County, with a large percentage of low-income and Hispanic beneficiaries. Ms. Swanson stated that "KTTV provided outstanding assistance and support for our fundraising activities." Ms. Swanson cited to KTTV's writing, production and heavy broadcast of a PSA promoting ECF's Dodgers Family Run, and KTTV's additional assistance by sponsoring and manning a booth at the event which supplied gifts to the children in attendance. Ms. Swanson observed that "[w]ithout KTTV's involvement, we could not have hoped for such an outstanding result."

PSAs promoting the "Dodgers Home Run 5K, 10K, and 1 Mile Family Run" were written, produced and broadcast by KTTV between Spring and September 1988; at the September 1988 Run, KTTV sponsored and manned a booth which supplied gifts to children (Fox Ex. 9, pp. 95-96).

28. *Affidavit of Stephanie Tombrello, Executive Director of the Los Angeles Area Child Passenger Safety Association (LAACPSA).* LAACPSA is a source of information, education and training, and program development and evaluation on child passenger safety and injury prevention. Ms. Tombrello complimented KTTV for its production of "three excellent public service announcements" promoting an annual Walkathon which generates public awareness on the issue of child safety. The PSAs featured a KTTV newsperson, who also participated in the opening ceremonies for the 1986 and 1987 Walkathons. Ms. Tombrello reported that "[d]uring both years, the messages generated a flood of calls from KTTV viewers, who telephoned with questions both about the Walkathon and about our services." Ms. Tombrello also appreciated KTTV's production of PSAs promoting the Safe Ride Helpline, noting that "[e]veryone at the station was extremely helpful to the young children who 'starred' in our announcements, and worked hard to make sure that the PSAs presented our message effectively." Ms. Tombrello concluded that "KTTV was enthusiastically responsive" and that the "television exposure provided by KTTV was among the most effective of all that LAACPSA received."

(a) In letters dated June 3, 1987, Ms. Tombrello thanked KTTV for its assistance to the SafetyBeltSafe[SM] Walkathon, noting that the contribution of KTTV "is indisputable." Ms. Tombrello also commended KTTV's "special effort" to schedule the Walkathon PSAs: "We certainly were informed of your success as a flood of telephone calls reached our office."

(b) In a letter dated November 1, 1987, Gayle Weiner and Janice West Seaman of Weiner/Seaman Productions, thanked KTTV for its "public spirited gesture" of writing, producing, directing and placing BUCKLEBEAR[R] PSAs.

(c) In a letter dated November 6, 1987, Ms. Tombrello thanked KTTV for the station's production of PSAs for LAACPSA's Safe Ride Helpline. Ms. Tombrello wrote that the Association was "very pleased" that KTTV produced the PSA "since we do not have the funds to have professional quality videos made for our organization."

PSAs promoting LAACPSA's SafetyBeltSafe[SM] Walkathon were produced by KTTV and broadcast in April and May 1986 and in April and May 1987; PSAs promoting LAACPSA's BUCKLEBEAR[R] Safe Ride Helpline were produced by KTTV and broadcast from October 1987 through April 1988 (Fox Ex. 9, pp. 97-105).

29. *Affidavit from Tanya Tull, Executive Director of the Los Angeles Family Housing Corporation (LAFHC).* This non-profit corporation develops temporary and emergency housing facilities and permanent housing, and provides support services, for homeless families in the Los Angeles area. Ms. Tull commended "KTTV's efforts to focus public attention on the problem of homelessness," which "played a critical role in the success enjoyed by LAFHC" and associated local shelters. Ms. Tull explained that KTTV had contacted her "in an effort to gain a better understanding of how their station would most effectively lend its support

to efforts to alleviate the problem of homelessness in Los Angeles" and that together, "we formulated a plan that resulted in the involvement of numerous community housing advocates in a KTTV effort to raise public awareness" about homelessness. Ms. Tull cited to KTTV's writing, production and editing of eleven PSAs and its planning and developing of a special program, "No Home for the Holidays."

PSAs designed to inform viewers about local shelters for homeless families were produced by KTTV and broadcast over KTTV from January through April 1988 (Fox Ex. 9, pp. 106-107).

30. *Affidavit of Larry Vanderveen, Founder and Board Chairman of the National Leukemia Broadcast Council (NLBC).* NLBC raises funds for leukemia research through broadcast events, with the proceeds benefitting the Leukemia Society of America. Mr. Vanderveen expressed NLBC's gratitude for KTTV's broadcast, in 1986 and 1987, at no charge for airtime, of the organization's annual telethon, as well as its production of promotional spots, which were used all over the country. Mr. Vanderveen noted that the telethon "has been an indispensable fundraising tool for our organization, and we are grateful for KTTV's assistance and support."

(a) In a letter dated June 12, 1986, Jon Ross, Executive Director, National Leukemia Broadcast Council, stated that NLBC is "very grateful" to KTTV for its "generosity" in broadcasting NLBC's annual telethon.

In June 1986 and August 1987, KTTV broadcast NLBC's annual telethon; during the summer of 1986, KTTV furnished facilities and materials for the production of promotional spots for the telethon (Fox Ex. 9, pp. 108-109).

Unsolicited Letters from the KTTV Public File

89. In addition to the affidavits described above, the following paragraphs describe a representative sample of the unsolicited letters received by KTTV during the license term.

1. In a letter dated March 31, 1986, Marion B. Collins, Principal of the Los Angeles Unified School District's Center for Enriched Studies -- Los Angeles, praised KTTV for its two-part news report on "Magnet Schools -- 9 Years Later." Ms. Collins stated that, while she had "always been impressed" with KTTV's news coverage, she wished "to express her extra appreciation" for the Magnet Schools story, which she found "informative, well focused, beautifully edited and extremely positive." She expressed the gratitude of her staff and parents for KTTV's efforts "to 'strike a little blow' on behalf of public education." (Fox Ex. 9, p. 112).

2. In a May 14, 1986 letter, Marjorie K. Diamond thanked KTTV for its news coverage of the "Remembrance Day of the Holocaust" ceremony. Ms. Diamond praised the "most courteous and interested" staff of KTTV, and thanked the news crew "for their courtesy and the respectful way they handled the evening." She wrote that KTTV "certainly deserves the praise and respect that it has earned." (Fox Ex. 9, p. 113).

3. In a June 23, 1986 letter, the President, Executive Director and Public Relations officer of the Alisa Ann Ruch Burn Foundation thanked KTTV for producing and airing the Foundation's burn-prevention PSAs. The authors wrote that the PSAs "have had a real impact on the viewing audience," and that "[w]hen our phone lines light up, we know a psa has aired." They expressed their "pleasure" at "working with KTTV's highly competent and caring personnel," and noted that the Foundation's Annual Report "thanks KTTV for their major contribution to burn prevention education." (Fox Ex. 9, p. 114).

4. In a letter dated July 14, 1986, Norma Flynn, Director, Publicity and Promotion of the Los Angeles Philharmonic Association, thanked KTTV for producing "two excellent public service spots" for the Association. Ms. Flynn stated: "As you can well imagine, we do not have a budget to produce our own spots. Because of your generosity, we will be able to bring attention to our very important program for young people . . . as well as to our subscription campaign for our winter season . . . ." On behalf of the Association, Ms. Flynn expressed her appreciation for "the support, interest and good will of your creative and technical staff . . . ." (Fox Ex. 9, p. 115).

5. In a letter dated August 11, 1986, Patricia A. Murphy wrote on behalf of Canine Companions for Independence to thank KTTV for its "prompt attention to [the organization's] last minute request for a story" about a missing canine companion. Ms. Murphy wrote "[w]e heartily appreciate your interest and subsequent interview of our program participant . . . and her Canine Companion . . . ." (Fox Ex. 9, p. 116).

6. In an August 12, 1986 letter, John G. Ouellet, President, YMCA of Metropolitan Los Angeles, thanked KTTV for its "marvelous editorial" on behalf of the YMCA. Mr. Ouellet noted that the station's "position is sincerely appreciated by all affiliated with the YMCA . . . ." (Fox Ex. 9, p. 117).

7. In a letter dated August 15, 1986, Jackie Tatum wrote on behalf of the Los Angeles City Recreation and Parks Department to express the Department's appreciation from KTTV's "wonderful coverage" of its 1986 Lotus Festival. Ms. Tatum wrote, "It is always a pleasure working with your station and staff," and noted that "[e]veryone is always very professional and cooperative." (Fox Ex. 9, p. 118).

8. In a letter dated August 21, 1986, Robert H. Heinbaugh, Executive Director of the Shanti Foundation, wrote to express the Foundation's "appreciation to the management, the production crew and to all the people who contributed to the Shanti public service announcement." Mr. Heinbaugh noted that the station's efforts enabled the Foundation to "reach out as we haven't been able to do previously" and expressed the Shanti Foundation's gratitude to KTTV's Public Affairs Director "for your commitment to the Los Angeles community." (Fox Ex. 9, p. 119).

9. In a letter dated October 10, 1986, Clarann J. Goldring, President, Los Angeles County Branch Orton Dyslexia Society, thanked KTTVs Director for

the station's assistance in the production and airing of a PSA for the Society. Ms. Goldring reported that "[e]ach time this 1 minute tape is aired, we receive 15 to 30 calls at our office," and emphasized that, "without you, we would not be able to reach the public." (Fox Ex. 9, p. 120).

10. In a letter dated October 20, 1986, KDAY(AM) General Manager Ed Kerby thanked KTTV's News Director, station staff and management "for the tremendous amount of support" the station provided to KDAY's "Day of Peace" activities promoting alternatives to illegal street gang activity (Fox Ex. 9, p. 121).

11. In a letter dated October 24, 1986, Kevin Sites and Kathye Murphy wrote on behalf of the Career Planning Center to thank KTTV for its assistance in taping a PSA for the Center's annual Women's Employment Options Conference. Noting that "the advance television exposure helped to make the event a wonderful success," Mr. Sites and Ms. Murphy thanked the station for its "commitment and dedication to community service organizations" like the Center (Fox Ex. 9, p. 122).

12. In an October 29, 1986 letter, Carole Dorsey, Executive Director, Claremont, Chamber of Commerce, thanked KTTV for featuring the Chamber's Village Venture Day Street Faire in its public service time. Ms. Dorsey wrote that the Chamber was "most appreciative of your assistance in making Village Venture Day a successful community event." (Fox Ex. 9, p. 123).

13. In a November 4, 1986 letter, Orange County Sheriff-Coroner Brad Gates thanked KTTV for airing his Department's recruitment PSA seeking applicants for deputy sheriff positions. Mr. Gates noted the "phenomenal response" generated by the PSA, which "ran exclusively on KTTV," and reported that it enabled the Department to fill 200 deputy positions. Sheriff-Coroner Gates enthusiastically praised "the tremendous help Fox Television has provided the Orange County Sheriff's Department in its recruitment efforts." (Fox Ex. 9, p. 124).

14. In a November 19, 1986 letter, Paul Gann, Chairman, California Fair Pay Amendment, thanked KTTV for its "generous allocation of air time for the *Yes on Proposition 61* Campaign." Mr. Gann praised the station's "dedication to keeping the public informed on matters critical to its future and best interests." (Fox Ex. 9, p. 125).

15. In a November 19, 1986 letter, Frank Booth wrote on behalf of Los Angeles City College to thank KTTV for its help in publicizing its Special Educational Homebound Program. Mr. Booth noted that the station's assistance "resulted in full enrollment in our program." He praised the station for its "awareness and understanding," which he emphasized made KTTV and its staff "a valuable asset to this community." (Fox Ex. 9, p. 126).

16. In a January 11, 1987 letter, Ronald R. Arias and Jamie M. Wesson, of the America Lung Association of Los Angeles County, thanked KTTV for providing free public service time throughout 1986. The authors noted that, by airing the Association's PSAs, KTTV had assisted in highlighting several issues of concern to the Association (Fox Ex. 9, p. 127).

17. In a January 20, 1987 letter, Erica Reiter wrote on behalf of Para Los Ninos to thank KTTV for a donation of toys to be distributed during the holiday season to the children of skid row and the central city of Los Angeles. Ms. Reiter praised KTTV for its assistance at a time when the organization's survival was dependent on private sector support (Fox Ex. 9, p. 128).

18. In a letter dated February 3, 1987, the Los Angeles County Public Library's Literacy Librarian, Josephine Dix, wrote to express her appreciation for KTTV's "generosity" in "donating time, staff and materials to promote" the Library's Literacy Hotline. Ms. Dix wrote that she was "impressed" by the station staff's "friendliness and professionalism" (Fox Ex. 9, p. 129).

19. In a letter dated February 11, 1987, Enid Awad and Natalie Shore, of the Client Assistance Program, wrote to express their "heartfelt thanks" for KTTV's airing of the Program's PSA. They enthusiastically reported that, since the PSA began airing on KTTV, new callers to the Program increased from eight to 50 per month. Ms. Awad and Ms. Shore emphasized KTTV's "tremendous service" to the disabled community, many of whom "really didn't know where to turn, or that the services they needed even existed." (Fox Ex. 9, p. 130).

20. In a February 17, 1987, Don H. Muchmore, Executive Vice President of the California Museum Foundation and Director of the California Museum of Science and Industry, expressed his "most sincere appreciation" for KTTV'S "excellent coverage" of the Museum's commemorative program on the anniversary of the Challenger explosion. He reported that the station's coverage "brought an enormous number of people to the Museum . . . ." Mr. Muchmore noted that, although KTTV had "always been very kind" to the Museum, "in this particular case you were even more kind and helpful and we are most appreciative." (Fox Ex. 9, p. 131).

21. In a March 12, 1987 letter, George L. Pla and Norene Zapanta, of the USC Mexican American Alumni Association, thanked KTTV for its support of the Association's annual scholarship dinner, benefitting Hispanic students. They noted that "[t]here is no doubt that the success of this event is due in large part to the assistance received from people like you." (Fox Ex. 9, p. 132).

22. In a March 18, 1987 letter, Eddie Albert, Dinner Co-Chair, Para Los Ninos Annual Dinner Carnival, thanked KTTV for its "generous contribution" to the Carnival, noting that the evening was "a huge success" and that KTTV's support "will enable PARA LOS NINOS to continue to provide valuable services to the disadvantaged in downtown Los Angeles" (Fox Ex. 9, p. 133).

23. In a letter dated March 26, 1987, Clarann Goldring and Arline Glasser, Los Angeles County Branch, Orton Dyslexia Society, expressed their deep appreciation for KTTV's "extremely supportive" assistance in airing PSAs for the Society. They re-

ported that "[w]e continue to receive a great response every time our message is seen on your station." (Fox Ex. 9, p. 134).

24. In an April 1, 1987 letter, Jacob Edelman, Public Affairs Director of Bet Tzedek Legal Services, expressed "deep gratitude" to the station for a PSA taped at KTTV. He noted that the organization, which provides free legal services, is "especially grateful for your station's generosity in producing the PSA at no cost, because the expense of producing one on our own would be prohibitive given our budget contraints." Mr. Edelman also observed that "[i]n past years, we knew instantly whenever a PSA of ours ran on your station, because of the very dramatic surge in telephone inquiries that would result . . . ." (Fox Ex. 9, p. 135).

25. In an April 9, 1987 letter, Eddy Tanaka, County of Los Angeles Department of Public Social Services, thanked KTTV for its "cooperation and assistance" in airing on short notice a PSA publicizing the "critical need we have for bilingual Spanish-speaking staff who provide social services to the public." Mr. Tanaka reported that "the response was excellent from potential job candidates who either saw or heard about the announcement aired by your station." (Fox Ex. 9, p. 136).

26. In an April 10, 1987 letter, Charles Alexander and Lorraine Wilson, American Diabetes Foundation, Southern California Affiliate, expressed their thanks and appreciation for the "outstanding public service announcements your station provided for our benefit concert," which was a "huge success" and helped raise funds for diabetes research and services (Fox Ex. 9, p. 137).

27. In an April 14, 1987 letter, Peter Drake, Hollywood Chamber of Commerce, thanked KTTV for producing a PSA for the Third Annual Hollywood Business Expo. Mr. Drake reported that "[e]veryone from the KTTV staff was very pleasant and helpful" and believed the PSA "will help us a great deal in stimulating public awareness of this important event." (Fox Ex. 9, p. 138).

28. In a letter dated May 4, 1987, Marion Genensky, Center for the Partially Sighted, thanked KTTV for airing PSAs promoting the free visual screenings and low vision examinations offered by the Center. Ms. Genensky stated that "[w]e have received several calls of inquiry from partially sighted persons who have heard of our services on KTTV. Some of these people did not know of the services we offer until viewing the PSA on KTTV . . . ." (Fox Ex. 9, p. 139).

29. In a May 14, 1987 letter, Timothy Burke, Hollywood Studio Museum, thanked KTTV "for the incredible support that we are receiving from you with the airplay of our" PSA. Mr. Burke wrote that since the PSA "started airing, our attendance figures have shown an increase, and the number of telephone inquiries because of seeing the spot on your station have been unbelievable!" (Fox Ex. 9, p. 140).

30. In a May 18, 1987 letter, Robert Heinbaugh, Executive Director of Shanti Foundation, thanked KTTV for providing a PSA that "has been extremely effective in attracting new volunteers as well as informing the community about one more resource available in the struggle of AIDS." (Fox Ex. 9, p. 141).

31. In a letter dated May 20, 1987, Richard Martinez, City of Anaheim Police Department, thanked KTTV for airing a drug prevention PSA. Mr. Martinez reported that "[w]e have seen the video on your station, and many of the students that we speak to . . . tell us that they continue to see this" PSA. Officer Martinez noted that, during presentations at area schools, he "encourage[d] students to look for the video on your station." (Fox Ex. 9, p. 142).

32. In a June 5, 1987 letter, W. R. Rose, General Manager, Ramona Pageant Association, wrote to "express our gratitude for your wonderful cooperation and donation of air time to inform the public of the 60th season of the Ramona Outdoor Play" and for "conveying the message of Ramona to thousands of people." (Fox Ex. 9, p. 143).

33. In a July 7, 1987 letter, Robin Shine, Para Los Ninos Carnival, expressed appreciation to KTTV for producing and broadcasting PSAs for the Carnival, purchasing dinner tickets for the event, and giving "your time, advising us on how to approach and obtain support from others." (Fox Ex. 9, p. 144).

34. In a July 21, 1987 letter, Esther Renteria, President, Hispanic Public Relations Association (HPRA), expressed to KTTV the "deepest gratitude and appreciation for your participation and for your generous support" for the 10th Annual Latino Athletes of the Year Awards, which raises funds for scholarships for Hispanic students in the areas of communications, journalism, public relations, broadcasting and theatre arts. Ms. Renteria stated that "[w]e are pleased to report that because of your generosity, this year's proceeds, which totaled more than $8,000 will enable HPRA to continue providing scholarships to Latino students." (Fox Ex. 9, p. 145).

35. In a letter dated July 21, 1987, Judith Alban, Jewish Big Brothers Association, thanked KTTV for donating circus passes to permit "[a] lot of kids" to "have a wonderful outing with their big brothers." (Fox Ex. 9, p. 146).

36. In a July 27, 1987 letter, Dana Tkac, Para Los Ninos, extended a "personal thank you for thinking of us with your generous gift of 50 tickets" to the circus (Fox Ex. 9, p. 147).

37. In an August 4, 1987 letter, Alyssum Long, representing ICAN Associates, which raises funds to support the Los Angeles County Inter-Agency Council on Child Abuse and Neglect, thanked KTTV for broadcasting a PSA concerning child abuse. The letter also expressed appreciation for information provided by KTTV "regarding your need for spots for children," and observed that "[i]t is much easier for us to create materials that are useful when we have some feedback from people such as you." (Fox Ex. 9, p. 148).

38. In a letter dated August 31, 1987, Beckie Moore Flati, American Cancer Society, thanked KTTV for airing a new PSA publicizing the dangers of smokeless tobacco (Fox Ex. 9, p. 149).

39. In a September 29, 1987 letter, Elma La Pointe and Bob Mizrahi, Miramonte Elementary School, thanked KTTV for "caring about the education of our boys and girls" by creating a special "Cartoon Clock Watch" to remind children watching morning cartoons that it was time to go to school. The letter noted that KTTV "was the only one in the television media to return my call and answer my letter" concerning he problem of tardiness and absenteeism. The School had been recognized by the Los Angeles County Office of Education for having the best attendance motivation program for 1986, and the authors acknowledged KTTV's assistance as "most unique and a major factor in our school being selected for this honor." (Fox Ex. 9, pp. 150-151).

40. In a letter dated November 4, 1987, Rolando Atiga, Filipino-Americans for Democracy in the Philippines, thanked KTTV for news coverage of the "Congress for the Restoration of Democracy in the Philippines" and expressed "appreciation of your position toward unbiased and responsive journalism." (Fox Ex. 9, p. 152).

41. In a November 11, 1987 letter, Carmen Ulmer, March of Dimes, Southern California, commended KTTV for its assistance and support in editing and duplicating a series of PSAs on alcohol awareness (Fox Ex. 9, p. 153).

42. In a December 17, 1987 letter, Linda Crismond, Los Angeles County Public Library, thanked KTTV for giving the Library's literacy program "a very precious gift: public service air time." Ms. Crismond expressed special appreciation for KTTV's "production and distribution of the excellent PSA featuring our referral librarian." Ms. Crismond reported that the referral librarians "have answered thousands of literacy calls since you began publicizing this local 800 number." (Fox Ex. 9, p. 154).

43. In a letter dated December 23, 1987, Nancy Bianconi, Valley Shelter, Inc., thanked KTTV for supporting Valley Shelton and its residents, noting that the fundraising event featuring stars of "21 Jump Street" "not only produced financial support, but also made the community more aware of the increasing homeless problem." Ms. Bianconi stated, "I must commend KTTV for being a forerunner in helping to alleviate homelessness." (Fox Ex. 9, p. 155).

44. In a letter dated March 15, 1988, Vera Davis, Low Income Elderly United-Community Assistance Program, wrote the KTTV to "wholeheartedly thank you for your support and contributions in assisting us," reporting that the "video helped us in establishing general public awareness, information, fundraising and public relations campaign." (Fox Ex. 9, p. 156).

45. In a March 22, 1988 letter, Barbara Rodriquez, Los Angeles Music and Art School, wrote on behalf of the board of the non-profit school to express "our deepest appreciation" to KTTV for its broadcast of a PSA. Ms. Rodriquez remarked that "[o]ver the past six months enrollment has increased dramatically. Daily inquiries as to what we do here are overwhelming! Never in the forty-four year history of the music school has anything had such a dramatic impact." (Fox Ex. 9, p. 157).

46. In a March 23, 1988 letter, Margo Morales, Community Development Commission, County of Los Angeles, thanked KTTV for helping inform the public about the Commission's Rental Rehabilitation Program. Ms. Morales observed that "[s]ince you began airing the . . . PSA last fall program inquiries have greatly increased" thereby enabling the provision of additional safe rental units for low-income families (Fox Ex. 9, p. 158).

47. In a letter dated April 6, 1988, Marie Gonzales, Hispanic Women's Council, thanked KTTV for its contribution to the Council and commended KTTV's "commitment to the community." (Fox Ex. 9, p. 159).

48. In a June 2, 1988 letter, Victor Contreras, Hispanic Academy of Media Arts and Sciences, wrote to "extend sincere and heartfelt appreciation" for KTTV's help in producing "HAMAS 88, The Pitch," as well as for the station's generous monetary contribution to the non-profit organization. Mr. Contreras remarked that the program, which promoted Hispanic/American talent, received "extremely positive" feedback (Fox Ex. 9, p. 160).

49. In a letter dated June 9, 1988, Esther Renteria, President, Hispanic Public Relations Association (HPRA), expressed "our deepest gratitude and appreciation" for the station's "generous support" of the Eleventh Annual Latino Athletes of the Year Awards. Ms. Renteria reported that the year's proceeds of over $12,000 would enable HPRA to continue providing scholarships to Latino students (Fox Ex. 9, p. 161).

50. In a June 13, 1988 letter, Ivan Houston, President, Golden State Minority Foundation, thanked KTTV for participating in the "Salute to Minority Education" Dinner, commending KTTV for helping "make the affair a resounding success" and noting that the fund raiser generated over $150,000 for outstanding and deserving minority students (Fox Ex. 9, p. 162).

51. In a June 30, 1988 letter, Beckie Moore Flati, American Cancer Society, wrote to say how "thrilled" she was when, while viewing KTTV, she discovered that the placement of the Society's "Smokeless Tobacco" PSA was "in with the children's programming . . . right at our target audience." Ms. Flati noted that this assistance "is just one example . . . of the great support we get" from the station (Fox Ex. 9, p. 163).

52. In a July 5, 1988 letter, John Esheveste, Telacu, wrote to express a "big thank you" to KTTV's public affairs director for hosting a meeting with local community organization representatives. Mr. Esheveste stated that "[w]e appreciate your initiative in bringing us together to discuss community needs, and to share suggestions as to how we can better access public service and news programming at KTTV." (FOX Ex. 9, p. 164).

53. In a letter dated July 6, 1988, Gail Christensen, Coalition for Pet Population Control, wrote to KTTV to "express my deepest thanks to you for the terrific

exposure you gave us during our campaign" which resulted in over 7500 calls to the Coalition's hotline to control overpopulation (Fox Ex. 9, p. 165).

54. In a August 31, 1988 letter, Harry Snyder, Director, West Coast Regional Office, Consumers Union of U.S., thanked KTTV "for providing a forum for Consumers Union to express its views on . . . the retail credit bill."

55. In a letter dated October 24, 1988, Lynn Harvey thanked a KTTV news reporter for his "valuable visit" to her Belmont High School class to speak about careers in broadcasting (Fox Ex. 9, p. 167).

56. In a November 22, 1988 letter, Bea Colgan, Big Brothers of Greater Los Angeles, expressed "[m]any, many thanks" for KTTV's donation of 150 copies of Tommy LaSorda's book, which Ms. Colgan assured "will be very much appreciated by the recipients at the Big Brothers annual Christmas party." (Fox Ex. 9, p. 168).

57. In a letter dated January 9, 1989, Jeffrey Rudolph, Managing Director, California Museum of Science and Industry, thanked KTTV and enclosed a copy of a letter of appreciation, dated January 4, 1989, to Barry Diller. Mr. Rudolph's letters noted that KTTV "has been especially effective reaching into Black, Hispanic, Asian and other communities that we serve with outreach programs" and that KTTV's public affairs director's "obviously strong ties with ethnic community organizations played a major role in the success" of "Children's ID Day," which was developed and hosted by KTTV. Mr. Rudolph reported that KTTV "did a tremendous job organizing and publicizing the program and videotaping and fingerprinting more than 2500 children in one day." Mr. Rudolph also commended KTTV for its production of a series of PSAs for the Museum that "caused our State Board members to burst into spontaneous applause after viewing them." Mr. Rudolph added that the station "did a great job and made a significant contribution to the success of our summer." (Fox Ex. 9, pp. 169-170).

Community Outreach Activities

90. During the renewal period KTTV not only addressed the ascertained problems and needs of its community through its broadcast programming, but also responded to those problems and needs through its participation in, and support for, community activities in its service area. KTTV took an active role in public service initiatives regarding child safety and homelessness; in addition, the station sponsored fundraising and cultural events, and station personnel donated their time to various community organizations.

91. *Children's I.D. Day*: KTTV conceived, planned and executed a major public service initiative, "Children's I.D. Day," in the Spring of 1988. The event took place on the grounds of the California Museum of Science and Industry, located in the area that is frequently the scene of gang violence. The station's objective was to bring together various segments of the community on neutral turf in a common community endeavor. Recognizing that the safety of their children was a particularly important concern of parents in this community, KTTV proposed to give parents an opportunity to have their children videotaped and fingerprinted for security purposes, at no charge, in a fair-like atmosphere. "Children's I.D. Day," on April 16, 1988, was the result (Fox Ex. 11, p. 1).

92. KTTV coordinated the entire event, making arrangements with the Museum for use of its grounds, securing video equipment and volunteer technicians, and enlisting the assistance of several local, county and state agencies in the identification process. Entertainment was provided, and free literature on child safety related topics was distributed. KTTV also produced and broadcast PSAs for the event (Fox Ex. 11, p. 2).

93. "Children's I.D. Day" brought together Hispanics, Blacks, whites and Asians -- including youths wearing rival gang colors. In addition to providing a valuable service for local residents, the event enabled neighbors to see that they shared common aspirations for their children. By the end of the day, approximately 2,500 children between the ages of 3 months and 18 years had been videotaped and fingerprinted. "Children's I.D. Day" also helped to generate increased interest in the Museum, which recorded its biggest single-day attendance figure all Spring (Fox Ex. 11, p. 2).

94. KTTV subsequently worked with KMEX, a Spanish-language television station, to organize a "Children's I.D. Day" for residents of East Los Angeles. KTTV co-sponsored and broadcast public service announcements for the event, which took place on October 29, 1988. A total of 952 children took part (Fox Ex. 11, p. 2).

95. *No Home for the Holidays*: During the 1988 holiday season, KTTV was instrumental in the success of a major public service undertaking to assist the Los Angeles homeless population and the agencies serving them. The station collaborated with the Greater Los Angeles Partnership for the Homeless in organizing and presenting a fundraising effort to help the homeless. Ultimately, a three-hour prime time program, called "No Home for the Holidays, was developed to call attention to the plight of the homeless and to solicit viewer contributions to six local shelters for homeless families (Fox Ex. 11, p. 3).

96. "No Home for the Holidays" was broadcast over KTTV on December 21, 1988. KTTV Program Director Don Tillman testified that the development of the program actually began in 1987, when KTTV "brought together a number of representatives of various homeless organizations from around the city of Los Angeles." (Tr. 544). The various organizations coalesced around a "cohesive plan" in early 1988, at which time it was decided to produce a program to raise funds for the homeless (Tr. 545).

97. Tillman explained that the station "wanted to make sure that every single penny we raised . . . went directly to the homeless, . . . and it took the better part of that year to develop, put everyone in place and get the Partnership to agree to handle the administration at no cost." (Tr. 545). The program was ultimately scheduled near Christmas, "when people were in the spirit of giving" (Tr. 546).

98. News and production crews were shooting material for inclusion in the show prior to November 30, 1988 (Tr. 554). KTTV relied on the Partnership's expertise to collect and present information regarding the problem of homelessness, and to identify recipients of viewer contributions. The station produced the program at its own expense, donating air time, studio and production facilities and personnel, to enable the Partnership to distribute all the funds collected to the recipient organizations (Fox Ex. 11, p. 3).

99. *Other Community Event Sponsorships*: During the renewal period, KTTV also participated as a sponsor of local community events, including the following:

KTTV was one of the sponsors of the "8th Annual Tom Sullivan St. Patrick's Day 10K Run" in March 1987. The race benefited The Blind Children's Center in Los Angeles.

KTTV was one of the sponsors of the annual "Children's Festival of the Arts," a weekend celebration featuring arts and crafts and entertainment for children, in August 1987 and 1988. The station paid for the design, production and printing of 100,000 copies of the 3-language brochures promoting the Festival, which was especially designed to reach out to the Hispanic and Armenian communities.

KTTV sponsored the annual Hollywood Open Golf Tournament in August 1986, 1987 and 1988. The tournament raised funds for the Hollywood Presbyterian Medical Center. The station underwrote the costs of the benefit and provided entertainment for the annual banquet. In addition, the station's Program Director was a member of the tournament's organizing committee.

100. *Community Involvement by KTTV Employees*: During the renewal period, KTTV encouraged its employees to be involved in the community, and station employees offered their services and expertise on behalf of community organizations (Tr. 603; Fox Ex. 11, p. 4). Representative examples of the community activities of station staff include the following:

KTTV's Program Director and Public Affairs Director participated in panel discussions about public service programming during workshops sponsored by the Southern California Broadcasters Association. The seminars, which took place each October during the renewal period, helped non-profit organizations learn about getting PSA, programming and news time on local television stations.

KTTV News reporter Donna Deaner-Bryce participated as spokeswoman and in the opening ceremonies of the SafetyBeltSafe Walkathon sponsored by the Los Angeles Area Child Passenger Safety Association in the Spring of 1986 and 1987.

KTTV News reporter Chris Harris was master of ceremonies for "A Celebration of the Advances in Diagnosis, Treatment and Research," presented by The Glendale-Burbank Chapter of Parkinson's Support Groups of America in April 1986.

KTTV News producer Dana Millikin participated in a panel discussion on careers in media as part of the annual Orange County Community College Journalism Day in April 1986.

KTTV News reporter Tony Valdez was a guest instructor for the California Chicano News Media Association's second annual Broadcast Journalism Workshop in June 1986.

Sam Benson, KTTV's Cable Relations Director, addressed students at Alta Loma High School about career opportunities in the media in May 1987.

KTTV Personnel Director Karen Hori participated in a panel as part of a program on careers in media presented by the Asian American Journalists Association in September 1987.

(Fox Ex. 11, pp. 4-5).

101. In addition, during the renewal period KTTV's Program Director participated in local community organizations in various capacities, including as Chairman of the Hollywood Chamber of Commerce, and as a member of the Hollywood Presbyterian Medical Center Foundation Board and the Board of Advisors for the Department of Radio and Television at California State University at Long Beach. KTTV's Public Affairs Director also participated in community organizations during the renewal period, including as a member of the media committees of the Los Angeles Chapter of the March of Dimes, the Los Angeles County Commission on Drug Abuse, and the Los Angeles County Human Relations Commission, and as a member of the Boards of Directors of Mother Against Drunk Driving, St. Anne's Maternity Home and Teen Canteen (Fox Ex. 11, pp. 5-6).

Awards & Honors

102. During the renewal period KTTV received awards both for its programming and for its broadcast and non-broadcast involvement in various activities in its community of license. The awards received by KTTV during the renewal period are listed below, along with a description of the award, where appropriate.

103. *Los Angeles Area Emmy Awards*: Emmy Awards are presented annually, on both a local and a national basis, by the Academy of Television Arts and Sciences. Emmys are awarded to recognize distinguished contributions in television broadcasting, programming and production (Fox Ex. 10, p. 1).

104. Tillman, who during the license term was a governor of the Academy of Television Arts and Sciences in Los Angeles, explained that two panels evaluate stations' submissions for awards -- the first to select nominees, the second to determine the award winners (Tr. 499). The panels include only judges from outside of Los Angeles (Tr. 502, 578). Tillman explained that daily newscasts, which are automatically eligible for consideration for the "Best Newscast" award, are the only program category not subject to this procedure (Tr. 500).

105. KTTV received the following local Emmy awards and nominations for programs broadcast between March 6, 1986, and December 31, 1986.

Winner, Spot News Same Day Breaking Story: "Cerritos Crash Special Report," August 31, 1986.

Winner, Children/Youth Independent Stations: "Have You Ever Wondered?" (series).

Winner, Film/Tape Editors of Hart News Programs: Scott Pfeiffer, "Trail of Greed, Trail of Death," November 14, 1986.

Winner, Camera Crew -- News Features: Marcie Cowlishaw, "Killer Cones," The 8 O'Clock News, August 13, 1986.

Nominee, News Special: "Trail of Greed, Trail of Death, November 14, 1986.

Nominee, Hosts/Moderators -- Specials: "1986 Academy Awards Weekend," December 22-23, 1986.

Nominee, Sports Series: Los Angeles Dodgers Baseball.

Nominee, Directors of Unedited Programs -- Non-News: Mark Wolfson, "Los Angeles Dodgers Baseball," August 13, 1986.

(Fox Ex. 10. pp. 1-2).

106. KTTV received the following local Emmy awards and nominations for programs broadcast between January 1, 1987, and December 31, 1987:

Winner, Regularly Scheduled Daily News Programs: "Fox News at 10."

Winner, Children/Youth Series -- Independent Stations: "Dr. Science."

Winner, Live Sports Coverage, "L.A. Dodgers Baseball."

Winner, Directors of Unedited Programs -- Non-News: Mark Wolfson, "Los Angeles Dodgers Baseball."

Winner, Camera Crew -- Hard News Breaking Story: Marcie C. Donovan, Racist Riot, "Fox News at 10," November 22, 1987.

Winner, Outstanding Achievement in Sound Mixing: Ken Teaney, "The Brain (Dr. Science)," October 24, 1987.

Winner, Outstanding Achievement in Music Composition: Rick Krizman, "Dr. Science."

Nominee, News Special: "What's Killing The Children?" December 21, 1987. This program was also one of 17 National Finalists, Chosen from over 200 entries, in the National Emmy Awards Competition for 1987.

Nominee, Investigative Reporting: "Death in the Orange County Jail," "Fox News at 10," September 25, October 19, November 2-5, 1987.

Nominee, Mini-Docs: "Dose of Deception," "The 8 O'Clock News," June 22-24, 29, 30, 1987.

Nominee, Spot News -- Same Day Breaking Story: Brush Fire, "Fox News at 10," September 10, 1987.

Nominee, Public Affairs Series -- Independent Stations: "Midday Sunday."

Nominee, Children/Youth Series -- Independent Stations: "Have You Ever Wondered?"

Nominee, Children/Youth Special -- Independent Stations: "What's the Matter With Parents Today?" (For Kids' Sake) December 28, 1987.

Nominee, Special Events: "1987 Tournament of Roses Parade," January 1, 1987.

Nominee, Sports Special: "25 Anniversary of Dodger Stadium," February 28, 1987.

Nominee, Hosts/Moderators -- Specials: Janet Zappala, Bill Redeker, "What's Killing The Children?" December 21, 1987.

Nominee, Directors of Unedited Programs -- News: Bill Finlay, "Pope John Paul II Pre-Liturgy & Mass at Dodger Stadium," September 16, 1987.

Nominee, Directors of Unedited Programs -- Non-News: Mark Wolfson, "1987 Tournament of Roses Parade," January 1, 1987.

Nominee, Film/Tape Editors of News Features: Jay Ankeney, "What's Killing The Children?" December 21, 1987.

Nominee, Camera Crew -- News Features: Marcie C. Donovan, "What's Killing the Children?" December 21, 1987.

(Fox Ex. 10, pp. 2-4).

107. KTTV received the following local Emmy awards and nominations for programming broadcast between January 1, 1988, and November 30, 1988:

Winner, News commentary: Eric Burns, "Last Temptation of Christ/E.T.," "Fox News at 10," October 19, 1988.

Winner, Special Events: "Emmy Awards Preview," August 28, 1988.

Winner, Live Sports Coverage: "Los Angeles Dodgers Baseball."

Nominee, Public Affairs Series (Studio-Based): "Midday Sunday."

Nominee, Mini-Docs: "No Place Like Home," "Fox News at 10," November 16-19, 1988.

Nominee, Special Events: "1988 Rose Parade," January 1, 1988.

Nominee, Sports Special: "The Dodgers . . . Rise to the Top," October 3, 1988.

Nominee, Host/Moderators -- Series: Greg Wyatt, Rick Monday, "1988 Dodgers Central."

Nominee, Directors of Unedited Programs -- Non-News: Mark Wolfson, "L.A. Dodgers Baseball."

Nominee, Film/Tape Editors of News Features: Jay Ankeney, "The RFK Story," June 6, 1988.

(Fox Ex. 10, p. 4).

108. *Angel Awards*: The Angel Awards are presented annually by Excellence in Media, an interreligious organization celebrating positive messages in media. The Awards are presented in recognition of positive media images. (Fox Ex. 10, p. 5).

109. KTTV received the following Angel Awards for programming broadcast between March 6, 1986, and November 30, 1988:

1987 Angel Award, Local TV: News Special, "What's Killing the Children?" This 30-minute special report investigated the high incidence of Cancer among the children of McFarland, California, a small farming community in the San Joaquin Valley. It was broadcast on December 21, 1987.

1988 Angel Award, Local TV: "Prom Night," a series of 30-second public service announcements encouraging young people not to drink and drive during their Prom Night celebrations. The spots ran in rotation throughout May 1988.

1988 Angel Award, Local TV: "The R.F.K. Story," a 30-minute special report examining the circumstances surrounding the assassination of Senator Robert F. Kennedy, presented to commemorate the twentieth anniversary of his death. The program was broadcast on June 6, 1988.

(Fox Ex. 10, p. 5).

110. *Golden Mike Awards*: The Golden Mike Awards are presented annually by the Radio and Television News Directors Association, in recognition of individual contributions to excellence in radio and television news coverage in the Southern California area (Fox Ex. 10, p. 6).

111. KTTV received the following Golden Mike Awards for programming broadcast between March 6, 1986, and November 30, 1988.

1987 Golden Mike Award, Best Documentary, for "Trail of Greed, Trail of Death," a KTTV News special investigating the importation of illegal drugs from Mexico to the United States, broadcast on November 14, 1986.

1987 Golden Mike Award, Best Specialized Segment, for "Troubleshooter," a regular KTTV News advocacy segment that investigated and remedied consumer and other complaints on behalf of residents of the station's service area. "Troubleshooter" segments were broadcast periodically during the renewal period.

(Fox Ex. 10, p. 6).

112. *Greater Los Angeles Press Club Journalism Awards*: Awards for significant contributions to local news coverage are presented annually by the Greater Los Angeles Press Club. KTTV received the following Journalism Awards from the Los Angeles Press Club for programming broadcast between March 6, 1986, and November 30, 1988:

1987 Certificate of Excellence, Newscast under 60 minutes, for "The 8 O'Clock News."

1987 Certificate of Excellence, Investigative Reporting. KTTV was the first award recipient in the thirty year history of the Press Club Awards to be honored for the overall excellence of all its entries in the Investigative Reporting category, rather than with a just one individual award. In all, five KTTV investigative series were honored as collectively and individually "outstanding."

(Fox Ex. 10, p. 7.)

113. *Other Awards*: In addition to the programming awards enumerated above, KTTV was the recipient of awards recognizing its service to the Los Angeles community during the renewal period. These awards included the following:

1986 Award of Appreciation presented by the Orange County Sheriff's Department

1986 Distinguished Public Service and Support award, presented by the City of Los Angeles Board of Recreation and Parks Commissioners

1986 Commendation, presented by the City of Los Angeles for work with the Los Angeles County Department of Children's Services Adoption Division

1986 Certificate of Appreciation, presented by Disabilities Awareness Committee of Southern California

1986 Service Award, presented by the Cystic Fibrosis Foundation

1986 Certificate of Appreciation, presented by Los Angeles Mothers Against Drunk Driving (MADD)

1986 Telethon Appreciation Award, presented by United Cerebral Palsy

1987 "Charlie Award," presented by the Hollywood Arts Council in recognition of KTTV's sponsorship and promotion of the Council's annual "Children's Festival of the Arts." KTTV provided printed materials for the festival and produced, free of charge, a broadcast public service announcement promoting the event

1987 Award of Appreciation, presented by Alicia Ann Ruch Burn Foundation

1987 Certificate of Appreciation, presented by the Los Angeles Police Department (LAPD)

1987 Certificate of Appreciation, presented by the Crippled Children's Society

1987 Award of Appreciation, presented by Naval Sea Cadets

1987 Award for ongoing support, presented by the Hollenbeck Youth Center

1987 Certificate of Merit, presented by the National Committee for Films on Safety

1987 Certificate of Appreciation, presented by the Los Angeles County Public Library

1987 Recognition from the Pasadena-Foothill Urban League

1988 Appreciation Award, presented by Goodwill

1988 Commendation Award, Presented by the NAB

(Fox Ex. 10, pp. 7-8).

Rainbow Broadcasting, Inc.

Description of the Applicant

114. Rainbow Broadcasting, Inc., a California corporation, was incorporated on September 30, 1988, by Esther Renteria. Rainbow's Articles of Incorporation authorize the issuance of 10,000 shares, of which 5,000 are Class A Voting Common Stock and 5,000 are Class B Non-voting Common Stock (Rainbow Ex. 1, p. 1).

115. The officers, directors and voting stockholders of Rainbow are:

Name	Position	Voting Stock and Percentage of Total Equity Ownership
Esther Renteria	President, director	1500 shares VS/ 15% equity
Alex Nogales	Vice president, director	1100 shares VS/ 11% equity
Grace Castro Nagata	Vice president,	1200 shares VS/ 12%
Fernando Del Rio	Secretary/ Treasurer, director	1000 shares VS/ 10% equity
Evelyn Fierro	Vice president, director	200 shares VS/ 2% equity

(Rainbow Ex. 1, p. 1).

116. The owners of Rainbow's non-voting stock are:

Name	Non-voting Stock and Percentage of Total Equity Ownership
Joe Sanchez	1000 shares NVS/10% equity
Bruno Ledwin	650 shaes NVS/6.5% equity
Rosemarie Vasquez	200 shares NVS/2% equity
Mary Salinas Duron	500 shares NVS/5% equity
John Echeveste	100 shares NVS/1% equity
Ana Barbosa	1100 shares NVS/11% equity
Alycia Enciso	100 shares NVS/1% equity
David Lizarraga	1000 shares NVS/10% equity
Martha Yaeger	100 shares NVS/1% equity
Alicia Moisa	250 shares NVS/2.5% equity

(Rainbow Ex. 1, p. 2).

Diversification

117. Other than its pending application for a construction permit for a new television station on Channel 11, Los Angeles, California, neither Rainbow nor its voting shareholders hold any attributable media interests (Rainbow Ex. 7, p. 1). Rainbow's proposed integrated voting shareholder Grace Castro Nagata has pledged to resign her employment as Director of Marketing at KSKQ(AM/FM), Los Angeles, upon grant of the construction permit to Rainbow (Rainbow Ex. 7, Attachment D).

Integration

118. Rainbow claims 50 percent quantitative integration credit for its proposal to integrate its five voting shareholders into the full-time management of its television station (Integration and Diversification Statement of Rainbow Broadcasting, Inc., dated November 9, 1990, at 1). Rainbow emphasized that it "does not seek to extrapolate the full-time management pledges of its voting shareholders into 100 percent integration credit." (*Id.* at 1-2 (footnote omitted)).

119. *Esther Renteria*, a 30 percent voting shareholder in Rainbow, proposes to devote a minimum of 40 hours per week to the position of President and General Manager of Rainbow's television station (Rainbow Ex. 2, p. 5). In that capacity, she will determine budgets, sign contracts and supervise the station's personnel director, its engineering staff and its legal affairs. Renteria will have ultimate authority with respect to all matters of station personnel and policy (Rainbow Ex. 2, p. 6).

120. Renteria has resided within the city-grade contour of Rainbow's proposed television station since 1939 (Rainbow Ex. 2, p. 1). She was employed as desk editor/newswriter at KNX(AM), Los Angeles, from 1968-1969, as an associate producer and series moderator at KCET(TV), Los Angeles, from 1969-1970, and as associate producer at KNXT(TV), Los Angeles, from 1970-1974. She was a consultant to KNXT(TV) from 1979-1982 (Rainbow Ex. 2, p. 4). Renteria is an Hispanic female (Rainbow Ex. 2, p. 1).

121. Renteria has been active in community affairs for more than 30 years. She was a founder of and is currently Chair of the National Hispanic Media Coalition, on whose steering committee she has served since 1986. *Id.* She was a member of the Board of Directors of the Bilingual Foundation of the Arts of Los Angeles. *Id.* She was a member of the "16th of September Festival Committee" Executive Board from approximately 1977 to 1985. *Id.* She was a founding member in 1984 and the first woman president (1986 to 1988) of the Hispanic Public Relations Association, of which she is still a member. *Id.* at 1-2. She is a former Secretary (1986 to 1988) of the Hispanic Academy of Media Arts and Sciences, Hollywood Chapter, of which she has been a member since 1985. *Id.* at 2. Since 1989, she has been a member of the Latina Advisory Council of Big Sisters of Los Angeles. *Id.* Since 1984, she has been a member of the Latin Business Association. *Id.* She is the only individual who has served for more than 10 years as a member of the East Los Angeles State Service Center Advisory Council (1963 to 1975). *Id.* From 1964 to 1968, she was a member of both the Plaza de la Raza Cultural Center's Board of Directors and also the East Los Angeles Regional Occupational Center's Advisory Council. *Id.* From 1974 to 1985, she was Publicity Director of the 16th of September Festival and 16th of September Parade. She is still Public Relations Director for the Parade. *Id.* In 1980, she served as Publicity Director for the Governor's Chicano Issues Conference, Los Angeles. *Id.* From 1961 to 1965, she was a member of the Education Commission of the Los Angeles County Commission on Id.

122. In August 1987, Renteria was selected by *Hispanic Business* magazine as one of the 100 Most Influential Hispanic Leaders in the United States. *Id.* In September 1987, she was honored to be one of the communications and entertainment industry leaders invited to meet with Pope John Paul II on his visit to Los Angeles. *Id.* In June 1987, she was honored by *Hispanic U.S.A.* magazine as one of the Top 100 Hispanic Women in Communications in the United States. *Id.* In 1985, she was given awards by the Los Angeles County Parks and Recreation Department for 11 years of distinguished civic service and also by Los Angeles Mayor Tom Bradley for contributions to the City of Los Angeles. *Id.* at 2-3. In September 1981, she received an award from the Los Angeles City Bicentennial Committee for significant contributions to the city. *Id.* at 3. In 1981, the LA County Library System presented her with an award in recognition of her work on "Anthony Quinn Day." *Id.* In March 1980, she received an "Honorary Membership award from Chicanos for Creative Medicine and again in May 1983 that group cited her for outstanding contributions. *Id.* In June 1981, she also was honored by the East Los Angeles College Student Body for service to them. *Id.* In September 1979, she was given an award for "outstanding service" by the Los Angeles "Sixteenth of September Festival" Committee. *Id.* In May 1978, she was given an award by the Los Angeles Eastside Sports Associ-

ation for "services rendered to the community sharing information vital to its citizens." *Id.* In November 1974, she was named as the "Professional Person of the Month" by the East Los Angeles Community Union for outstanding contributions to the community. *Id.* In November 1975, she was honored by the Los Angeles County Parks and Recreation Department for assisting them to improve programming in the East Los Angeles area. *Id.* In February 1973, she was honored by the Los Angeles County Probation Department for "assistance in efforts to enrich and reinforce probation programs through community involvement." *Id.* In February 1972, she won the Silver Spur (Espuela de Plata) Award from "Nosotros" President Ricardo Montalban as an outstanding image-maker in the Hispanic community for the weekly TV series, "The Siesta is Over." *Id.* at 3-4. In 1970 and 1972, that series was nominated for Emmy Awards in its category. *Id.* at 4. She also served in 1972 as a member of the Los Angeles County Commission on Police and Mexican-American Community Relations. *Id.* In January 1964, she was presented with the Outstanding Journalistic Achievement Award by East Los Angeles College in recognition of her "in-depth coverage of the Mexican-American Community and the school dropout problem." *Id.*

123. *Alex Nogales*, a 22 percent voting shareholder in Rainbow, proposes to devote a minimum of 40 hours per week to the position of Rainbow's Vice President of Programming (Rainbow Ex. 4, p. 4). In that capacity, he will have primary responsibility and supervisory authority for all programming matters, except for the station's non-entertainment programming (Rainbow Ex. 3, p. 4).

124. Nogales has resided within the service area of Rainbow's proposed television station since approximately 1964 (Rainbow Ex. 3, p. 1). He was employed as a senior producer at KCBS-TV, Los Angeles, from 1978-1990. Between 1971 and 1978, he was employed as a television and film writer, producer and director (Rainbow Ex. 3, pp. 2-3). Nogales is Hispanic (Rainbow Ex. 3, p. 1).

125. From 1985 until 1989, he was a member of the Hispanic Academy of Media Arts and Sciences, Hollywood Chapter. *Id.* He was vice president of the Hollywood Chapter from 1985 to 1987 and president from 1987 to 1989. *Id.* Since 1986, he has been Vice Chair and a member of the Steering Committee of the National Hispanic Media Coalition. *Id.* Since 1989, he has been a member of the Alliance of Hispanic Media Professionals. *Id.* Since 1990, he has been a member of the Latin Business Association. *Id.*

126. *Grace Castro Nagata*, a 24 percent voting shareholder in Rainbow, proposes to devote a minimum of 40 hours per week to the position of Rainbow's Vice President-Sales (Rainbow Ex. 4,p. 4). In this capacity, she will determine policy for and will oversee the station's sales and traffic departments, and will directly supervise the station's general sales manager, national sales manager and local sales manager (Rainbow Ex. 4, p. 4).

127. Nagata has resided within the service area of Rainbow's proposed television station for approximately fifty years (Rainbow Ex. 4, p. 1). Since July 1986 she has been employed as Director of Marketing at KSKQ(AM/FM), Los Angeles. She was employed as an account executive at KALI Radio from 1981-1986, and as Manager of Community Broadcast Services at KCBS-TV, Los Angeles, from 1977-1979 (Rainbow Ex. 4, pp. 2-3). Nagata is an Hispanic female (Rainbow Ex. 4, p. 1)

128. From approximately 1972 to 1980, she was a member of the California Association of Latins in Broadcasting (CALIB); she was CALIB's vice president in 1974. *Id.* From approximately 1976 to 1978, she was a member of Women in Communications, LA Chapter. *Id.* From 1975 to 1977, she was a member of the National Organization for Women. *Id.* From approximately 1970 to 1972, she was a member of the Hispanic Women's Council of Los Angeles and served on its Advisory Committee from 1971 to 1972. *Id.* In 1984, she served as a member of the Citizens Advisory Commission of the Los Angeles World Olympics. *Id.* Since 1982, she has been a member of the Asian Pacific Women's Network (APWN) and served on the Board of Directors for four years; she served as Fundraising Chair for two of those years. *Id.*

129. *Fernando Del Rio*, a 20 percent voting shareholder in Rainbow, proposes to devote a minimum of 40 hours per week to the position of Rainbow's Director of Public Affairs Programming and Community Relations (Rainbow Ex. 5, p. 3). In that capacity, he will have primary responsibility for determining policy and for supervising the station's public affairs programming and community relations efforts. He will also supervise the station's editorial director and its broadcast of public service announcements (Rainbow Ex. 5, p. 3).

130. Del Rio has resided within the service area of Rainbow's proposed television station continuously since 1970. Prior to 1970, he resided within the service area from 1932-1950, 1954-1957, 1959-1961 and 1963-1968 (Rainbow Ex. 5, p. 1). Between 1970 and 1990 he was employed as Vice President/Public Affairs and Editorial Director at KCAL-TV, Los Angeles (Rainbow Ex. 5, p. 2). Del Rio is Hispanic (Rainbow Ex. 5, p. 1).

131. His community involvement in the Los Angeles area includes the following:

Professional Organizations:

American Federation of Television and Radio Artists (AFTRA) - Member 1970 to present

Greater Los Angeles Press Club - Member 1986 to present

National Broadcast Editorial Association - Member 1978 to 1990

Radio and Television News Association - Member 1987 to present

Hispanic Public Relations Association - Member 1988 to present

Community Organizations:

Southern Christian Leadership Conference - Member 1979 to present

Public Counsel, Inc. - Board member 1989 to present

Library Adult Reading Project - Member 1988 to present

East Los Angeles College Foundation - Board member 1990 to present

Small Business Administration Advisory Council - Chair 1989 to present

United Way Allocations Committee - Member 1988 to present

USC Community Advisory Council - Executive Committee 1988 to present

Id. at 1-2.

132. *Evelyn Fierro*, a 4 percent voting shareholder in Rainbow, proposes to devote a minimum of 40 hours per week to the position of Rainbow's Vice President of News Programming (Rainbow Ex. 6, p. 3). In that capacity, she will have primary responsibility for determining policy and supervising the station's news, sports and weather programming and personnel (Rainbow Ex. 6, p. 3).

133. Fierro has resided for all but two years of her life within the service area of Rainbow's proposed television station (Rainbow Ex. 6, p. 1). She was employed as a news producer/writer at KNBC-TV, Los Angeles, from 1982-1989 (Rainbow Ex. 6, p. 2). Fierro is an Hispanic female (Rainbow Ex. 6, p. 1).

134. Since 1990, Fierro has been Mayor of the City of South Pasadena. *Id.* Her term on the City Council ends in 1992. *Id.* In 1986, she was named an Outstanding Young Woman of the Year. *Id.* Since 1987, she has been a member of Comision Femenil de Los Angeles. *Id.* From 1986 to 1989, she was a member of the Business and Professional Woman's Club of South Pasadena and was named BPW Woman of the Year in 1986. *Id.* From 1982 to 1990, she was a member of the California Chicano News Media Association and was its president in 1988. *Id.* From 1986-1988, she was president of Parent Alert, a South Pasadena anti-drug/alcohol abuse group. *Id.* From 1988-1991, she served on the Policy Board of Directors of "Project Day," a youth diversion program serving four Los Angeles area cities. *Id.* at 1-2. She is now president of Policy Board for Project Day. *Id.* at 2. She was executive director of Adolescent Pregnancy Childwatch of Los Angeles County. *Id.* From 1989 to 1990, she was a member of California Compact, a leadership group spearheaded by the Governor. *Id.*

135. Upon grant of Rainbow's application, each of its proposed integrated voting stockholders pledges to withdraw from any employment or business pursuits and to resign any office in any philanthropic, political or civic organization with which he or she is then involved (Rainbow Exs. 2, p. 5; 3, p. 4; 4, 4; 5, p. 2; 6, p. 2).

Rainbow's Financial Qualifications At the Time of Certification

136. Prior to filing its November 1, 1988 application for Channel 11 at Los Angeles, Rainbow encountered difficulty in obtaining a written bank loan commitment letter. Rainbow's communications counsel had drafted a proposed bank letter (Thompson letter) to be used by Rainbow in obtaining "reasonable assurance" to demonstrate its financial qualifications. (Rainbow Ex. 2, p. 2; Fox Ex. 13). Esther Renteria, a Rainbow director and proposed full-time president and general manager of the TV station, who was responsible for obtaining financing for the station, asked David Lizarraga and Joe Sanchez, two proposed non-voting shareholders to see if they could get bank loan commitment letters from their respective banks. Both reported back that their banks did not deal in the entertainment industry and did not supply the kind of letter requested. (Tr. 649-651, 660, 838, 886-888). Mary Duron, who was vice-president of First Interstate Bank and a prospective Rainbow shareholder, also confirmed to Renteria that banks don't like to issue that kind of commitment letter because some banks had been sued for specific performance on the purportedly non-binding letters and had lost the cases. Thus, in late 1988 it was apparent that there was a reluctance on the part of banks to issue "reasonable assurance" letters to broadcast applicants. (Rainbow Ex. 2, pp. 6-7; Tr. 654-655). Renteria herself contacted Wells Fargo Bank and another bank in late October but nothing came of either contact (Tr. 654-655).

137. In Rainbow's November 1, 1988, application, Rainbow declined to certify as to its financial qualifications because it did not have a written loan commitment (Tr. 801). Rainbow explained in Exhibit 6 (Financial Qualifications) to its application that California banks appeared because of recent adverse litigation to disfavor the "reasonable assurance" letters routinely issued in past FCC cases (Rainbow Ex. 2, p. 7; Fox Ex. 18, Appendix A, pp. 1-2; Tr. 661) Renteria understood that a commitment letter from a bank or other financial institution was needed to give reasonable assurance that at the time a construction permit is obtained, the applicant could reasonably be expected to qualify for financing necessary to construct the station (Tr. 800). She also understood from her communications counsel that verbal or oral understandings were acceptable in establishing financial qualifications although the written letter was preferable[6] (Tr. 803-804). Her counsel further explained to her that she could file the application but did not have to certify as to her applicant's financial qualifications until the hearing date (Tr. 651-652, 803).

138. Also in late October or early November 1988, Renteria contacted Ed Roybal, operations manager for the Montebello Branch of the Bank of America where she and Rainbow had accounts (Rainbow Ex. 2, p. 7; Tr. 653, 676, 681-682). She asked Roybal if the bank was still doing loan commitment letters. Roybal responded affirmatively and suggested that she come in and talk to Alex Vasquez in the bank (Tr. 677, 808). Vasquez recalled Roybal telling him that there was a potential of receiving a large account through Renteria who had formed or was forming an organization that was going after a TV license in L.A. (Tr. 1138, 1141-1142). Roybal also mentioned various other persons in Renteria's group but Vasquez could not recall who they were (Tr. 1139). Vasquez knew Renteria to be a very good customer of the Montebello Branch (Tr. 1150). However, he was not familiar with her creditworthiness and he had never seen her financial statements (Tr. 1211).

139. Renteria called Vasquez, who was the branch manager of the Montebello Branch of the Bank of America and set up an appointment with him. She said in the conversation that she was looking for assistance in development of a letter to assist her group in obtaining a license and that she would bring a draft (Tr. 1148, 1228). Renteria met with Vasquez on November 4, 1988. When she arrived Vasquez was reading a story about Rainbow in the L.A. Times (Tr. 682). The story confirmed that Roybal had told him about Renteria's group which he understood to be predominantly Hispanic (Tr. 1143-1145). Renteria asked Vasquez for his help in obtaining for Rainbow a $10 million loan commitment from the Bank of America (Rainbow Ex. 2, p. 7; Tr. 1230). They discussed the nature of the FCC proceeding, the general value of Channel 11's license, the cost estimates, and the general purpose of the loan which was to be for start up costs. (Tr. 682, 816).

They also discussed Rainbow's investors some of whom were known personally to Vasquez through their business with the bank and others because they were well known leaders of the Hispanic community. (Rainbow Ex. 2, p. 7; Tr. 682, 707, 816, 1169-1170, 1219). Renteria gave Vasquez a two page document containing brief descriptions of the investors as well as a copy of the draft loan commitment letter prepared by her communications counsel (Tr. 682-683, 686-687, 1160; Fox Ex. 13; Rainbow Ex. 14, pp. 2-5).

140. The draft bank letter (Thompson draft) stated in pertinent part:

> In response to our discussions regarding Rainbow Broadcasting's application to the Federal Communications Commission, this will confirm our willingness to loan up to $10 million to Rainbow Broadcasting, Inc., if and when the company should receive a permit from the FCC to construct a new television station at Los Angeles.
>
> The loan would bear interest at _____ points above "prime" and would be repayable in _____ consecutive monthly installments (including interest) commencing on the fourth month of broadcast operation, and would be collateralized by the operating assets of the TV station.
>
> The bank understands that there is no certainty that Rainbow Broadcasting's application for a new television station in Los Angeles will be granted by the FCC, nor even when a final determination will be reached.
>
> Nevertheless, we understand that the company intends by this letter to rely on the bank for a reasonable assurance of its financial qualification to construct and operate the station. If and when the FCC permit is obtained, then a formal loan application would have to be filed and whatever lender qualifications in existence then would have to be met by Rainbow Broadcasting, Inc.

It was Renteria's understanding, in November 1988, that the draft letter, as written, would comply with the Commission's requirements regarding financial qualifications (Tr. 683, 693-695; Fox Ex. 13).

141. Renteria did not give Vasquez any financial statements of the stockholders at their November 4th meeting (Tr. 685-686). In fact, Vasquez testified that he never saw any financial statements of the Rainbow investors (Tr. 1165-1166). (Tr. 1154). According to Vasquez, Renteria did not indicate at their first meeting why details in the draft letter she provided were important (Tr. 1220). By the end of their meeting, Vasquez understood that Renteria wasn't seeking an immediate loan, rather, she was seeking a letter stating a potential of a loan in future years (Tr. 1156-1157). He understood that the letter was to assist in the FCC licensing process and that the request was for a letter "about her relationship with the bank" (Tr. 1155-1156). He called the letter she was seeking a "letter of convenience" (Tr. 1154). According to Renteria, Vasquez indicated it would be a good project for the community, the bank and the Hispanics (Tr. 709, 752). Vasquez told Renteria that neither he nor the Montebello Branch of the Bank of America had the authority to give Rainbow the commitment it was seeking. He stated he would take the matter up with proper bank officials. (Rainbow Ex. 2, p. 8; Tr. 691-692, 808, 1160). Renteria entrusted him with doing so (Tr. 758).

142. Following his meeting with Renteria, later that same afternoon Vasquez contacted Tim Jenson, vice-president of the City of Commerce Branch of the Bank of America with whom he had previously worked to obtain financing for projects (Tr. 7719-1180). As vice-president, Jenson was a relationship manager, with the major part of his job being to attract and retain clients (Tr. 1040). The City of Commerce Branch served Vasquez's Montebello Branch in terms of reviewing applications and providing commercial loans (Tr. 1028). The telephone conversation with Jensen lasted about 10 to 15 minutes. According to Vasquez, he told Jenson that he was calling on behalf of Renteria whom he described as a very good depositor at Montebello Branch and a long time customer[7] (Tr. 1184-1186). Vasquez testified that he also mentioned to Jenson that there were other investors who were also probably financially sound, but Jenson noted that the bank lacked financial data on them (Tr. 1235). Vasquez indicated to Jenson that Renteria may be a potentially large depositor in the future in connection with a TV project (Tr. 1185-1186). Vasquez did not tell Jenson that the TV station may be acquired through litigation (Tr. 1219) and does recall whether he indicated the TV project was in Los Angeles (Tr. 1185).

143. According to Vasquez, he paraphrased for Jenson the Thompson draft loan commitment letter which Renteria had provided to him, highlighting certain points. They discussed who at the bank had the authority to approve such a letter and who would have to get involved in creating such a letter in a very short time frame. Jenson indicated he might have to check out such a letter with his superiors or the legal department. (Tr. 1186-1187). Vasquez also forwarded a copy of the Thompson draft letter to Jenson. The next morning they again discussed the Thompson draft and Jenson said that he would definitely consult with his superiors and the legal department and work out something quickly to get back to Vasquez. (Tr. 1187, 1289). According to Vasquez, they discussed that the letter was to be used in hopes of Rainbow obtaining an FCC license and if that happened, "that potentially we may be able to make the loan to Rainbow, but naturally we would require financial data". (Tr. 1190). Vasquez urged Jenson to resolve the matter quickly and get a letter out because he wanted to keep Renteria as a personal account (Tr. 1233). Vasquez assumed that Jenson took the original draft and discussed it with his superiors (Tr. 1239-1240).

144. Thereafter, Jenson's branch put together a letter signed by him and dated November 7, 1988, and addressed to Ms. Renteria. The letter stated:

> As we discussed, after Rainbow Broadcasting has obtained the appropriate operating licenses, Bank of America would be interested in discussing with you possible financing for the purchase of the television station. Any financing proposal would be subject to our review and analysis of all relevant financial statements and a satisfactory business plan. If you have any questions do not hesitate to contact me.

(Rainbow Ex. 2, Att. C). Also, on that date, Vasquez called Ms. Renteria and told her to come to the bank to pick up the letter (Tr. 696).

145. Renteria discussed the November 7, 1988, letter with Vasquez and told him it wasn't what she needed. According to Renteria, the letter did not provide reasonable assurance nor did it represent a present firm intention to lend. (Tr. 697-698, 1188, 1197). She said she needed something closer to the original Thompson draft which she had furnished with the specific terms and details to show more of a willingness on the part of the bank to lend money (Tr. 697-699, 1220). Although the Bank of America letter was signed by Jenson, Renteria did not seek to contact him directly. Rather, she continued to deal through Vasquez, whom she considered to be her banker. (Tr. 698).

146. Vasquez sent the November 7, 1988 letter back to Jenson and that day they talked in greater detail about what Renteria was looking for in the letter (Tr. 1188). According to Vasquez, during the period from November 7 to 16, 1988, there were also a number of follow-up calls between him and Jenson about the purpose and terms of the letter and the $10 million loan request (Tr. 1198). They talked specifically about whether they could mention the sum but mainly about the construction of the letter, including the reference or interest rate which was to be "plus three" but, according to Vasquez, they never talked about repayment terms (Tr. 1191, 1192, 1223). Jenson mentioned that he could not prepare a letter like that requested by Rainbow from the bank without looking at financial documents from the customer or customers (Tr. 1223-1224). However, at no time prior to issuance of the November 16th letter did Vasquez or Jenson seek additional information (Tr. 1191-1193). Vasquez didn't request any because his branch didn't have the authority to make the type of loan requested (Tr. 1193). There were two additional reasons why they didn't seek financial information from Ms. Renteria. One was the time frame because she needed the bank letter right away. The second was that Jenson and Vasquez were not pursuing the matter as a loan request but "merely as a letter saying that potentially we may make a loan if this ever came about." Vasquez recalled that they discussed the "reasonable assurance" provision in the Thompson draft and that he explained to Jenson that it was "more of a commitment than we were going to be able to do without looking at financial statements." (Tr. 1226). Jenson indicated to Vasquez that he considered the proposed bank letter to be a letter assisting a customer which he would furnish provided he obtained approval from his superiors (Tr. 1189-1190).

147. Following receipt of a new draft from Jenson, Vasquez called Renteria on November 16 to come to pick it up at his office (Tr. 733). Vasquez handed her a copy of the letter and said that it was prepared based upon her request to "do something" with the November 7 original letter (Tr. 1241).[8] The November 16 letter, also signed by Jenson, was closer to the Thompson draft but still deviated substantially from it. (Compare Fox Ex. 13 with Rainbow Ex. 2, Att. D).

148. The November 16 letter addressed to Renteria and signed by Tim Jenson stated:

> In response to our discussions regarding Rainbow Broadcasting's application to the Federal Communications Commission, this will confirm our willingness to consider a loan up to $10 million to Rainbow Broadcasting, Inc. after a complete analysis, if and when the company should receive a permit from the FCC to construct a new television station at Los Angeles.
>
> The Loan would bear interest at a market rate above Bank of America's reference rate and would be repayable in consecutive monthly installments (including interest).
>
> The bank understands that there is no certainty that Rainbow Broadcasting's application will be granted by the FCC, nor even when a final determination will be reached.
>
> If and when the FCC permit is obtained, then a formal loan application would have to be filed and whatever lender qualifications are in existence then would have to be met by Rainbow Broadcasting, Inc.

(Rainbow Ex. 2, Att. D).

149. Renteria was not satisfied with the November 16 letter and did not want to accept it. It was not what she was seeking and did not satisfy the financial qualifications requirements to allow her to certify to the Commission (Tr. 724-25). According to her it lacked specifics about the interest rate; the number of repayments was not specified; the collateral was not stated; and it failed to include anything about a moratorium on repayment (Tr. 862-863).

150. Renteria sent a fax of the November 16, 1988, Jenson letter to her communications counsel, Thompson. She attached a cover letter stating "This is probably the strongest letter we can get from Bank of America." (Fox Ex. 14, pp. 1-2; Tr. 732-734).

151. Renteria testified that she was not concerned about the inclusion of the words "willingness to consider" in the bank letter because she was not applying for a loan at that time (Tr. 714-715). Moreover, she discussed the wording with both her communicatons counsel and local counsel and concluded that, in fact, the language didn't bother her since the entire letter merely evidenced a willingness to consider a loan because the last paragraph very plainly stated that the loan is only good after you qualify on a formal loan application (Tr. 864-865). With respect to the absence of the "reasonable assurance" wording in the Jenson draft, she testified that based on her conversations with her counsels, she understood that the entire Jenson letter provided "reasonable assurance" and that there was no need to restate "the obvious" (Tr. 865).

152. She and Thompson also had a conversation in which they discussed the climate of banking in California, the difficulty in getting bank letters, and the content of their letter. Thompson did not feel the November 16 letter was entirely satisfactory for financial qualifications purposes. He suggested that they needed to add a section on collateral and that she talk to the bankers to see if she could get a stronger letter. (Tr. 739-740). She could not recall if Thompson gave her any other specific suggestions for changes. (Tr. 740-741). Her understanding from her discussion with Thompson was that she "should seek alternative ways of getting a stronger letter from the Bank of America, reaching some kind of oral understanding with the Bank of America, or finding another lending entity to give a different letter."[9] (Tr. 869).

153. After speaking with Thompson, Renteria had another lengthy conversation with Vasquez in which she told him that the November 16, 1988, letter was not what she needed. They discussed again the nature of the proceeding,

the FCC requirements and other information which they had previously shared. At Thompson's suggestion, she requested that the sentence, "It would be collateralized by the operating assets of the station," be added to the end of the letter's second paragraph (Tr. 734-737; Fox Ex. 15). Vasquez understood that she wanted to get the bank letter as close to the Thompson draft as possible. Vasquez said he would speak to Jenson again, but Renteria asked if she could speak with Jenson directly and negotiate the letter and things she needed. Vasquez gave her Jenson's number. (Tr. 730-731, 733, 866, 1188, 1241-1442).

154. Renteria had a conversation with Jenson on the 16th, late in the afternoon (Tr. 766, 870). According to Renteria, they discussed the entire project.[10] From the conversation it appeared to her that Jenson had received documentation from Vasquez because they discussed the stockholders although they did not discuss the stockholders' or Renteria's creditworthiness. (Tr. 759). Renteria testified that she asked Jenson if he could give her a better letter than the draft she had obtained that morning. They discussed the bank's problem with litigation and the fact that she was not applying for a loan that she needed immediately. (Tr. 743).

155. Renteria testified that she and Jenson came to an agreement that as a result of the various law suits certain things would not be put in the bank letter. She claimed that they came to an understanding of what the terms of the loan would be including the probable repayment and the probable interest rate. (Tr. 743, 747-748, 753). Specifically, according to Renteria, Jenson told her that the bank was no longer quoting prime rates of interest in writing, and was reluctant to quote a repayment schedule for a transaction that was going to be many years in the future. That was the reason why he could only tell her that it would be somewhere between 60-120 months. He also told her that the interest rate would probably be two points above prime, but he would not put that in writing. Based on the conversation, Renteria claimed to have a preliminary understanding with Jensen as to the reason why the interest rate and repayment information was not being put into the letter as she had asked. (Tr. 753-755).

156. According to Renteria, Jenson told her that the data he quoted about the interest rate and repayment schedule was based on what the bank was doing that day and he couldn't quote her a rate for the future because he had no way of knowing what that would be. That's why they didn't want to put it in writing (Tr. 770, 902). He said nothing about due diligence (Tr. 754-755, 773). Renteria claimed she made it clear that they were talking about a letter for the FCC and that Rainbow would be in litigation for 3-5 years (Tr. 755). She claimed that she "asked him if the bank could give us a reasonable assurance that if we could qualify, meet their lending requirements at the time they needed the money, and his answer was yes." (Tr. 757). She did not ask him about inserting the term "reasonable assurance" because to her "the whole letter is a reasonable assurance." (Tr. 758).

157. Renteria testified that she did not think it unusual for him to agree to something orally that he could not put in writing (Tr. 759, 761). She never questioned Jenson's authority to do so. She stated that she was relying on her personal banker's (Vasquez) judgment in taking the matter to another official within the bank. Further, she didn't question Vasquez concerning Jenson's authority to orally agree to terms and conditions which he was unwilling to put in writing because Vasquez had explained to her that the bank had a problem with putting specific terms in letters where the loan was not going to be used at some future, unspecified time. (Tr. 769). She also assumed from Vasquez' referral to Jenson that Jenson had authority to write the November 16 letter. (Tr. 760).

158. Renteria testified that she also had a conversation with Jenson on the 17th in which he reported on his conversation with Vasquez in which they discussed what more they could collectively do to arrange for her letter. He reiterated the bank's problem with litigation, and the fact he couldn't put things down in writing because it was against the bank's policy. He also repeated the interest rate and repayment schedule (Tr. 746, 767-768). Renteria testified that it was as a result of this conversation that she believed she obtained the oral understanding which was the basis for her financial certification. (Tr. 871). Her understanding as a result of the conversation with Jenson on the 17th was that the rate would be two points above prime, whatever prime might be, that the repayment schedule would be 60-120 months. Jenson also indicated that he thought the moratorium request could be handled. (Tr. 872-874).

159. In a brief conversation with Jenson on the 18th he told her she could pick up the letter at the City of Commerce Branch rather than the Montebello Branch. She went there intending to speak to him about getting a better letter but Jenson was not in. (Tr. 771). She picked up the letter (Tr. 743, 764).

160. With the exception of the inclusion of a clause about collateralization (different from the provision in the Thompson draft), the text was identical to that of the November 16 Jenson letter which Renteria admitted was unsatisfactory for FCC purposes (Tr. 714-725). The November 18 bank letter deviated markedly from the Thompson draft letter prepared by Rainbow's communications counsel (Compare Fox Ex. 13 with Rainbow Ex. 2, Att. E).

161. The November 18 bank letter, upon which Rainbow relied to demonstrate "reasonable assurance" read as follows:

> In response to our discussions regarding Rainbow Broadcasting's application to the Federal Communications Commission, this will confirm our willingness to consider a loan up to $10 million to Rainbow Broadcasting, Inc. after a complete analysis, if and when the company should receive a permit from the FCC to construct a new television station at Los Angeles.
>
> The loan would bear interest at a market rate above Bank of America's reference rate and would be repayable in consecutive monthly installments (including interest). It would be collateralized by assets acceptable to the Bank including all the operating assets of the station.
>
> The Bank understands that there is no certainty that Rainbow Broadcasting's application for a new television station in Los Angeles will be granted by the FCC, nor even when a final determination will be reached.
>
> If and when the FCC permit is obtained, then a formal loan application would have to be filed and whatever lender qualifications are in existence then would have to be met by Rainbow Broadcasting, Inc.

(Rainbow Ex. 2, Att. E).

162. Unlike the original Thompson draft which confirmed a "willingness to loan" up to "$10 million upon receipt of a permit," the actual bank letter read "willingness to consider a loan". Moreover, the first paragraph in the bank letter also noted that the loan would be considered only "after a complete analysis," a requirement not found in the Thompson draft.

163. Additionally, the Thompson draft sought specificity regarding number of points above prime; a specific number of monthly installments for repayment; and a moratorium on payments till the fourth month; the bank November 18 letter did not provide any of the specifics nor the moratorium. Finally, the Thompson draft included the following sentence in the final paragraph:

> "Nevertheless, we understand that the company intends by this letter to rely on the bank for reasonable assurance of its financial qualifications to construct and operate the station, . . ."

that provision was absent from the bank letter. In sum, with the exception of having included a provision on collateralization,[11] the shortcomings Renteria found in the November 16, 1988 letter remained in the November 18, 1988 letter which Rainbow submitted to demonstrate its financial qualifications. Renteria admitted that, notwithstanding the addition of language regarding collateralization, the November 18 letter, like its predecessor, did not provide Rainbow with the reasonable assurance of financing required by the Commission. Tr. 730.

164. Upon receipt of the November 18 letter from Jenson, Renteria faxed a copy to her attorney. She discussed it with him saying that she had confirmed with Vasquez and Jenson that it was the best letter that she was going to get from the bank. She told Thompson of her oral understanding with Jenson as to the repayment schedule and probable interest rate. Based on the letter and her oral understandings with Jenson she told her attorney that she felt reasonably assured that if Rainbow obtained the license for Channel 11, they could go to the Bank and the Bank would give them the loan, provided they met the bank's lending requirements at that time. (Tr. 774). She admitted that the letter standing alone did not provide reasonable assurance, but emphasized that in the context of her conversations with Vasquez and Jenson, she felt she had reasonable assurance. (Tr. 730). Following issuance of the November 18 letter, Vasquez had no further contact with Jenson about Rainbow. (Tr. 1206).

165. According to Vasquez, the significance of the November 18th letter is the fact that it was provided to Renteria. The fact that Vasquez knew she was one of his better customers made a big difference because they probably would not provide such a letter for a non-customer. The entire letter transaction was based on the Esther Renteria relationship with the Montebello Branch. In his opinion, the letter committed from Bank of America's view "that we may have in the future an opportunity to do business with Rainbow." (Tr. 1231-1232).

166. Neither Vasquez nor Renteria had any further discussions with Jenson regarding Rainbow's request, and Renteria never met him personally. (Tr. 797, 1206). However, more than a month after her receipt of the November 18 letter, and a full month after Rainbow had filed an amendment certifying its financial qualifications on the basis of a "written commitment" from Bank of America, Renteria wrote to Jenson to "confirm" her understanding of their November conversations.[12] (Tr. 779; Rainbow Ex. 2, Attachment F). Renteria's letter, drafted by counsel and dated December 21, 1988, stated, in pertinent part:

> On behalf of Rainbow Broadcasting, Inc., I want to thank you and the Bank of America for your letter dated November 18, 1988.
>
> While your letter did not expressly state the interest rate that would apply to Rainbow's loan, it is my understanding from our discussions that collateralized loans of this nature would normally bear interest at two percentage points above the Bank of America's reference rate, adjusted at the time of the loan for any adverse change in the risk of business. It is also my understanding that the loan, if made by the Bank of America, would be repayable over a period of approximately 60-120 months and that a three-month moratorium on payments likely could be arranged.

(Rainbow Ex. 2, Attachment F). Jenson did not respond to Renteria's December 21 letter (Tr. 898).

167. Jenson testified that he did not remember Alex Vasquez or recall having any dealings or discussions with him or any bank officials concerning Rainbow's proposal (Tr. 1059-1060). From a review of the November 7, 16 and 18 letters which he was shown, he recalled a brief conversation or discussions with someone at Rainbow regarding an application for some kind of credit or loan. However, he had no recollection of the substance of the conversations. (Tr. 1059, 1076, 1094).

168. Jenson[13] testified that prior to his deposition in this proceeding (on November 5, 1990) he did not recall writing or seeing any of the bank letters in question, namely November 7, 16, 18, 1988, which were sent out over his signature. (Tr. 1022-1024, 1063, 1094). With respect to the November 7 letter which started "as we discussed" and the November 16 and 18 letters which started "In response to our discussions," Jenson stated that had discussions not taken place he would not have used such terms. However, he also noted that it appeared the letters which had been shown to him that they were a form letter and it is possible the reference to more than one discussion was an error. (Tr. 1074-1076). He explained that the reason he would have sent three letters was because he did so at the request of the potential client and he sought to establish a rapport or relationship with the client. Based on his review of the letters it also appeared to him that the potential client had not given him enough information to make a determination whether or not the bank would do business with it. (Tr. 1091-1092). Jenson also did not recall receiving or responding to Renteria's December 21 confirmation letter or the follow-up July 6, 1989, letter. Although Jenson did not recall receiving the December 21 letter he indicated that when he received a letter such as that and its contents are different from what he had previously indicated orally or in writing, he would clarify it. (Tr. 1029, 1031, 1034, 1035).

169. Jenson testified that he did not have the authority on his own to make a legal commitment or to express the bank's intention to make a loan. He would have to go before a loan committee. (Tr. 1049, 1053). He did not have authority to issue "high probability" of commitment or

"reasonable assurance" letters, and would not provide them (Tr. 1045). Moreover, he did not recall any discussions with any bank officials about providing a bank letter to Rainbow. (Tr. 1073). His job was that of an "idea generator." His authority was limited to providing terms and conditions for a proposal. (Tr. 1049-1052). If asked about interest rates or repayment schedules, he could only respond by explaining terms the bank was currently providing to similarly situated borrowers. (Tr. 1053).

170. Jenson testified that before he sent out a letter such as the November 18, 1988, letter he would have it reviewed by legal counsel because it was not a typical letter and was apparently based on a form letter sent by the prospective borrower to the bank. The text of his letter would probably have been written by someone in his department. (Tr. 1063, 1065, 1068). He would want the letter reviewed from the perspective of the bank to make certain that it did not contain any terms in conflict with the message he wanted to communicate (Tr. 1077).[14] He claimed that he did not know the purpose of the letter. (Tr. 1102).

171. Jenson did not consider the November 18, 1988, letter to be a commitment letter and explained that Bank of America has a definite structure and process for issuing a commitment letter that is binding. (Tr. 1079, 1097). Jenson testified that the nature of the November 18 letter was to express to the company a willingness to entertain and consider the company as a potential client should they meet the bank's criteria once the bank has received the necessary information to analyze it. (Tr. 1081, 1091-1092). However, he did not recall receiving any information from Rainbow. (Tr. 1083). Moreover, even if he had seen the information on the Rainbow shareholders as set forth in Rainbow Ex. 14, pp. 3-5, (describing briefly the vocations and holdings of the Rainbow investors) it would have been relatively insignificant on a loan decision. (Tr. 1087). He emphasized that by using the term "willingness to consider" the bank was seeking to make clear that there was no misunderstanding on the borrower's side. He emphasized that "considering" versus "willingness to make loan" are different. He testified that if the letter said "willingness to loan subject to these conditions," it would be a commitment to loan under the described terms, provided the conditions were met. (Tr. 1103-1105). In his mind the letter of the 18th was preliminary to any proposal to lend on the part of the bank. Moreover, the letter did not even suggest that a proposal would follow. That would be dependent upon the information received from the prospective borrower. Jenson couldn't even develop a proposal until he knew enough about the business, including its management, to get the correct interest rate and delineate all the necessary terms to make such a proposal. (Tr. 1106-1107).[15] He was aware of the fact that Bank of America was involved in litigation concerning various commitments to lenders that the bank failed to honor. That was why the bank had developed the rigorous process concerning issuance of proposal and commitment letters. (Tr. 1098).

172. Jenson described the terms in the November 18 letter as "vague generalities versus specific terms and conditions on which they would consider lending." (Tr. 1113). He noted that the interest rate, i.e. "market rate above Bank of America's reference rate" does not provide a specific meaningful rate of interest because all loans bear interest at a "market rate." (Tr. 1114-1116). He also described the complex process of determining the interest rate. (Tr. 1054-1055). With respect to the repayment being in consecutive monthly installments he said "that's pretty standard" and did not constitute a definite repayable payment term. (Tr. 1116, 1120-1121; Rainbow Ex. 2, Att. E). As to the collateralization which was "by assets acceptable to the bank including all the operating assets of the station" he stated that "there's no definition there of what those assets are." (Tr. 1117; Rainbow Ex. 2, Att. E). He said the likelihood was that if there had been very much analysis with respect to the finances of the individuals or applicant he would have remembered, but, in fact, he did not recall. (Tr. 1118-1119). In his view, the type of information provided in the letter was available to anyone who asked. (Tr. 1121).

Rainbow' Current Financial Qualifications

173. On January 31, 1991, Rainbow withdrew its reliance on Bank of America for reasonable assurance of its financial qualifications. In its place, Rainbow intends to substitute a February 6, 1991 letter to Renteria from Far East National Bank (FENB). (Rainbow Ex. 8).[16]

174. On November 16, 1990, Esther Renteria and Grace Nagata, a Rainbow stockholder, met with Henry Hwang, President and Chairman of the Board of Far East National Bank to seek a loan to acquire Channel 11. This was at a time when Rainbow was getting mixed signals from Bank of America about its outstanding bank letter. (Tr. 932-933, 974). Renteria and Nagata explained the project to Hwang. However, at the hearing Hwang could not recall if they explained how the license was being sought or various other details of the information Renteria claimed to have provided. (Tr. 935, 975, 988, 990). Hwang recalled that he understood that they were seeking the bank letter for the FCC to indicate the bank's interest in making a loan in the event Rainbow acquired the license. (Tr. 936, 976, 992). He understood that the loan would not be taken down immediately. (Tr. 991). He testified that the bank had previously provided commitment letters for radio applicants although he did not believe that they made any actual loans (Tr. 935, 980).

175. Rainbow provided Hwang with a draft bank letter, an updated document describing the shareholders, and a business plan (Fox Ex. 13; Rainbow Ex. 19; Rainbow Ex. 21; Tr. 936). Hwang told the women that the $10 million loan they requested exceeded the authorized federal bank loan limited for FENB and that he would have to syndicate the loan and limit the bank's participation to $3.5 million. (Tr. 977-979). He indicated that he had frequently been the lead syndicator on loans. (Tr. 946). Hwang understood that by providing a letter FENB was agreeing to make and arrange the loan should (1) Rainbow receive the license and (2) meet all lending criteria after they received the license. (Tr. 993). By the end of the meeting Hwang expressed his interest in making the loan and said the bank would follow up with specifics. (Tr. 979). They agreed to meet again after he followed up with his people. (Tr. 946).

176. Hwang reviewed Rainbow's business plan which included resumes and balance sheets of Rainbow investors. (Rainbow Ex. 21; Tr. 993, 996). Other information he considered in addition to the business plan was the fact that any company that has a license for a major TV channel in Los Angeles has a valuable property so that banks would be interested and find it profitable to lend money to such a venture. (Tr. 997).

177. Hwang asked his secretary to prepare a draft letter. He forwarded that draft to FENB vice-president Ann Cheung to see if it met with the bank's criteria and, if so, to send it out on his behalf. He indicated to Ms. Cheung that he looked at the business plan and letter and felt comfortable issuing a letter if she felt the same way. (Tr 1000). Ms. Cheung reviewed the letter and gave her approval. (Tr. 981-982).

178. Renteria followed up on the November 16 meeting with a letter dated December 4, 1990, which included a paragraph on syndication which was suggested and prepared by Rainbow's communications counsel. She suggested that the paragraph could be incorporated in the draft previously furnished to Hwang. Renteria noted in her letter that it was not necessary to name in the bank letter the other banks to be involved in the syndication. (Fox Ex. 20; Tr. 933, 944-945). Renteria had no subsequent meetings with Hwang but other Rainbow principals, namely Nagata, Alex Nogales and local counsel Armando Duron met with him. Renteria did speak with Hwang on the telephone (Tr. 947-948).

179. Thereafter, a period of time elapsed until Rainbow's counsel, Thompson, and Duron decided it would be preferable to come up with a new bank letter from FENB which more closely resembled the bank letter in the Multi-State case.[17] (Tr. 942, 948-950). Duron prepared a new draft letter which he transmitted to Thompson on January 30, 1991. (Fox Ex. 21). Thompson revised that draft and forwarded it to Renteria on July 31, 1991. (Fox Ex. 22). The January 31, 1991, draft (Fox 22, p. 2) spelled out the conditions under which the $10 million loan would be made to Rainbow, set forth the interest rate at 2% above prime, provided a three month moratorium, and indicated repayment would be in 60 equal monthly installments. It contained a paragraph stating that the bank anticipated syndicating $6 million of the loan and provided for the names of the participating banks. It also included a statement concerning reasonable assurance as to the availability of the funds recognizing that Rainbow intended to rely on the letter to demonstrate its financial qualifications. (Fox Ex. 22; Tr. 948).

180. This draft was subsequently revised on February 1, 1991 to delete any reference to syndication. It was revised because local counsel and communications counsel decided that the language on syndication was not necessary. (Fox Ex. 23; Tr. 954). It was this draft which ultimately became the February 6, 1991 loan commitment letter from FENB to Rainbow. (Rainbow Ex. 8, Appendix A).

181. The letter addressed to Renteria and signed by FENB Vice-President Ann Cheung provides:

> Following our review of Rainbow's business plan and our discussions about your company's proposal to build and operate a new TV station on channel 11 at Los Angeles, this will confirm our bank's willingness to lend and arrange financing for up to $10,000,000, provided the following conditions are met:
>
> 1. You are successful in obtaining approval from the Federal Communications Commission to construct and operate a television broadcast station on VHF channel 11 in Los Angeles; and
>
> 2. All reasonable and ordinary credit criteria of the lenders are met at such time as you (a) have received the permit to construct said station, and (b) request a formal lending commitment.
>
> While the pricing and terms of amortization of any loan will, of course, be contingent upon the exact credit conditions prevailing at the time of such loan, we contemplate calculating interest on any loan made at the rate of 2% above the prime rate of this bank at the time of each advance; and any loan made will be repaid, after a three-month moratorium as necessary, in 60 equal monthly installments or as otherwise reasonable in line with financial projections received prior to the time of borrowing. The loan will be collateralized by a first lien on all the assets of the TV station.
>
> Although we understand that there is no certainty when or if Rainbow's application will be granted by the FCC, we understand that Rainbow intends by this letter to rely on our bank for reasonable assurance of its financial qualification to construct and initially operate channel 11 at Los Angeles.
>
> Please keep me advised on the progress of your application.

182. Renteria was advised by her counsel that the FENB commitment letter signed by Ann Cheung was sufficient for providing reasonable assurance of Rainbow's financial qualifications. However, since Renteria had not dealt with Cheung and had only had one conversation with Hwang about syndication she chose to send a letter confirming her understandings with Hwang that syndication would be in the $6 million range. (Tr. 957). She wanted her oral understandings to be in the file. (Tr. 960). Her counsel prepared a draft (Fox 24) which Renteria edited and subsequently sent to Ms. Cheung (Rainbow Ex. 8B, Tr. 959-961).

183. In her February 12, 1991, letter addressed to Ms. Ann Cheung Renteria initially thanked her and Mr. Hwang for their efforts in reviewing Rainbow's project. She then sought to confirm her understandings by stating:

> First, it is our understanding that, should a formal loan application be approved by your bank after we obtain the FCC permit, your bank intends to syndicate $6 million or more of such loan. Secondly, it is our understanding that Far East National Bank has successfully syndicated such loans in the past and that your bank is reasonably assured that Rainbow Broadcasting's proposed loan would be successfully syndicated.

(Rainbow Ex. 8, App. B).

184. With respect to FENB's February 6, 1991, loan commitment letter, Mr. Hwang repeated that he had looked at the Rainbow business plan and looked at the text of the commitment letter. (Rainbow Ex. 8, Att. A; Tr. 999, 1000). He felt that the bank letter stated the conditions upon which the bank would lend money and he felt comfortable with the conditions even though the loan's effectuation may be a number of years in the future. (Tr. 1004). He testified that he had the authority to issue such a letter without the need for concurrence from a board of directors. (Tr. 1000).

185. Hwang further testified that he saw a copy of Renteria's letter on or about February 12, 1991. He concurred that her understandings were correct, namely that if Rainbow's application were approved, FENB would syndicate about $6 million of it and he was reasonably assured that the proposed loan could be successfully syndicated. (Tr. 1002). He admitted that FENB had not syndicated any loans for broadcast properties in the past. He was confident, however, that Rainbow's could be because any company that has a license for a major TV station has a very valuable property in a very profitable business. He believed it would attract many bankers who would be willing to participate in its financing. He acknowledged that FENB had not yet had any discussions with any other banks to ascertain their interest in participating in a potential loan to Rainbow. (Tr. 987, 1002-1004).

CONCLUSIONS

Fox's Renewal Expectancy

186. Both the Commission and the courts have recognized that, in a renewal proceeding, an incumbent's past performance affords the Commission the strongest and most reasonable basis for determining whether the public interest will be served by its renewal.[18] In a literal sense, a licensee "runs on its record . . . "[19] *See Simon Geller*, 90 FCC 2d 250, 271 (1982). In this context, it is well established that a substantial record, sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal, gives rise to a renewal expectancy which in turn warrants a preference in comparative renewal proceedings. *See Broadcast Communications, Inc.*, 93 FCC 2d 1162, 1166 (1983); modified 97 FCC 2d 61 (1984), aff'd by judgment *sub nom. Genesis Broadcasting, Inc., v. FCC* No. 84-1154 (D.C. Cir., filed March 29, 1985) citing *Cowles Broadcasting, Inc.*, 86 FCC Cir. 2d 993 (1981), *affirmed Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 51 RR 2d 1405 (D.C. Cir. 1982) and *Radio Station WABZ, Inc.*, 90 FCC 2d 818 (1982) *affirmed Victor Broadcasting Inc. v. FCC*, 722 F.2d 756 (D.C. Cir. 1983). A substantial performance can be demonstrated by any type of showing reasonably related to demonstrating service over and above what would be considered minimal. *Broadcast Communications, Inc.*, 93 FCC 2d at 1166.

187. In determining the renewal expectancy weight, the Commission has looked primarily at (1) the amount of non-entertainment programming presented, the time of day it is presented and whether it is directed to local needs and interests, (2) the amount of locally produced programming, and (3) the reputation of the station in the community. *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants*, 4 FCC Rcd 6363, 6368 n. 11 citing *Radio Station WABZ, Inc., supra* 90 FCC 2d at 840-842. The premise underlying the granting of a renewal expectancy is that an incumbent's proven record of performance provides a greater assurance of continued performance than do the untested promises of a challenger. Based upon KTTV's performance during the renewal period, it is concluded that Fox's broadcast record is substantial and deserving of a renewal expectancy preference.

188. A licensee providing substantial service to its community must make a "diligent, positive and continuing effort" to "discover and fulfill the tastes, needs and desires of his service area." *See Intercontinental Radio, Inc.*, 98 FCC 2d at 631 (*quoting En Banc Programming Inquiry*, 44 FCC 2303, 2312 (1960)). It is undisputed that KTTV ascertained the needs and interests of residents of Los Angeles and the southern California region in a continuing and thorough manner. KTTV representatives regularly conducted in-person interviews with community leaders representing a broad cross-section of the community, and the station periodically organized and convened group discussions of community concerns attended by station personnel and local citizens and community leaders. In addition, KTTV bolstered its ascertainment program by maintaining informal contacts with local organizations and by participating in various community functions and events.

189. A total of 269 formal ascertainment interviews were conducted by KTTV during the renewal period. These interviews encompassed broad geographic, cultural, racial and ethnic cross-sections of the community, and included consultations with representatives of minority and women's groups, community organizations, educational institutions including the public schools, religious organizations, the arts, local state and federal governments, and the private sector. Through these extensive and undisputed outreach efforts, KTTV "ensured that it maintained a continuous pulse of its community." *See Tele-Broadcasters of California*, Inc., 58 RR 223, 230 (Rev. Bd. 1985).

190. The issues and concerns identified by KTTV's thoroughgoing ascertainment efforts provided the focus for programming, produced by the station itself and by others, that was "particularly responsive to community needs" and that "provided forums for local community leaders and the discussion of community problems." *See Cowles Broadcasting, Inc.*, 86 FCC 2d at 1007. For example, KTTV presented an array of Los Angeles residents, including several locally produced programs. An outstanding example of KTTV'S public affairs programming was "Midday Sunday," a locally produced 30-minute program presented regularly on Sunday mornings from September 13, 1987 through the end of the renewal period. The program featured frank discussion of various matters of concern to the Los Angeles community. "Midday Sunday" provided a forum for in-depth consideration of community problems by a cross-section of local and regional community leaders.

191. KTTV's regularly scheduled public affairs programming also included "Good Day L.A.," a 30-minute program produced by KTTV and broadcast on Saturday mornings from March 6, 1986 through September 5, 1987. The program brought together community representatives to address issues specifically identified by KTTV's ascertainment process. Especially noteworthy was "Eleven's Kids," a segment produced by KTTV and aired periodically within "Good Day L.A." that introduced KTTV viewers to area children eligible for adoption or in need of foster care. A significant measure of the success of the "Eleven's Kids" segments was the testimony of a representative of the Los Angeles County Department of Children's Services that they resulted in a high adoption rate for hard to place children.

192. Other regularly scheduled public affairs programs that demonstrated KTTV's commitment to address the ascertained needs and interests of its community were "Speak Out" and "New Forces," both of which were produced by KTTV. "Speak Out," a 30-minute program produced in association with a local religious organization, was presented regularly on Saturday mornings between

March 6, 1986 and August 8, 1987. "Speak Out" featured discussions on a variety of typical issues, and was designed to encourage cooperation among the numerous diverse communities within KTTV's service area. "New Forces" was a summer replacement series of 30-minute programs broadcast on Saturday mornings between March 6 and June 7, 1986. The program, which was hosted by a handicapped individual confined to a wheelchair and which originated entirely on location, focused on the unique problems and needs of the Los Angeles handicapped community.

193. KTTV also broadcast "*Hour Magazine*" a 60-minute program broadcast at 12:00 noon Monday through Friday which, although not exclusively public affairs, featured interviews and dealt with a wide range of matters including consumer issues and human interest stories (May 1987 through June 1988); and "*PM Magazine*" a 30-minute general interest program, presenting a mix of nationally and locally produced segments, the latter of which were produced daily by KTTV and focused on issues and events of local interest, highlighting efforts and accomplishments of individuals in the Los Angeles community. (March 6, 1986 through August 29, 1988).

194. KTTV's responsiveness to the ascertained needs, interests and concerns of Los Angeles community was also reflected in its locally produced daily coverage of local, national and international news. Throughout the license term, KTTV presented live, 30-minute news broadcasts between one and three times daily. KTTV's news broadcasts included "The Midday News, presented between March 6, 1986 and May 22, 1987; "The Eight O'clock News," a prime time newscast presented from March 6, 1986 through September 4, 1987; "The 11 O'clock News," an evening newscast presented between March 6 and October 6, 1986; "The Midnight News," presented weeknights between October 9, 1986 and September 3, 1987; and "Fox News at Ten." a prime time newscast presented between September 5, 1987 and the end of the license term. "Fox News at Ten" won a 1987 local Emmy award for Best Regularly Scheduled Daily News Program; in addition, beginning in September 1988, the program was simulcast in Spanish over the second audio program channel of KTTV's stereo transmission system. KTTV also presented Saturday and Sunday evening newscasts throughout the license term, and, beginning in April 1988 and continuing through the end of the renewal period, presented an early morning rebroadcast of the previous evening's newscast.

195. KTTV's resolve in providing in depth coverage of local and regional news and events is exemplified by its employment of a full time news staff averaging 48 employees throughout the license term. During the license term KTTV also acquired its first satellite news gathering truck and an additional mobile news gathering van, computerized its News Department, and leased a news helicopter.

196. KTTV's commitment to news was also evidenced by its periodic interruption or preemption of regularly scheduled programming to present special coverage of breaking events, and its expanded coverage of news events and topical issues within its regularly scheduled newscast. For example, during its evening newscasts, KTTV presented award-winning investigative series on the development of experimental treatments for AIDS and cancer patients, the medical and technical abuses being perpetrated by local AIDS testing facilities, and the over-crowded conditions at the Orange County Jail. KTTV also provided in-depth coverage of issues of concern to viewers during "The Midday News." Through interviews, discussions and debates, KTTV explored matters including handgun control legislation, insurance practices, pornography, drug and alcohol abuse, teen suicide, tax reform legislation and mandatory drug testing.

197. KTTV's news programming also responded to ascertained community needs by featuring periodic reports on issues of special concern to senior citizens, such as health care, employment opportunities and housing trends. KTTV also conducted an ongoing "Troubleshooter" campaign, designed to respond to and assist in resolving individual viewer concerns and complaints regarding local businesses, government agencies, and crime. Beginning in November 1987, "Troubleshooter" broadcast segments were augmented by a telephone service to assist viewers in resolving their problems or concerns.

198. KTTV also broadcast special programs throughout the license term, encompassing subjects such as the Smithsonian Institution's Collections, the California Lottery, AIDS and Dr. Martin Luther King Jr. It produced and broadcast a series of public affairs oriented programs called "*For Kids' Sake Specials*" directed at parents and focussing on issues children face. KTTV broadcast a series called "*Infinite Voyage Specials*" which focused on environmental and scientific issues, subjects which had come up frequently in the ascertainment process. KTTV provided air-time and made its facilities available to charitable groups for their fund raising efforts. The station broadcast programs specifically addressed to the interests and concerns of children including: "*Dr. Science*" a live KTTV produced 30-minute program to educate children about basic scientific concepts, which ran between September 19, 1987 and February 27, 1988 and which won a 1987 Emmy award for Best Program, Children/Youth -- Independent Stations; and "*Kidsongs*" which was broadcast on Saturday mornings at 7:30 a.m. from September 1987 through the end of the renewal period and featured traditional children's songs performed by children in music video-like sequences. KTTV broadcast PSAs and made its facilities available throughout the license term for the production of public service messages. Through the license term it broadcast a total of 28,126 PSAs or an average of approximately 27 per day for 1986, 1987 and 1988. The aforementioned special programs and children's programs and assistance in the production and broadcast of PSAs further illustrate the extent of KTTV's public service commitment.

199. The Commission has stated that the most reliable index of a licensee's public interest record is "its reputation and standing in the local community." The record here of laudatory public witness affidavits, unsolicited letters and awards and commendations clearly reflects that KTTV enjoys the highest regard in the Los Angeles community. Thirty public witnesses submitted affidavits on behalf of KTTV, and 78 unsolicited letters were received into the record. In addition, Rainbow cross-examined ten of KTTV's 30 public witnesses, and their oral testimony only reinforced the view that the station is held in high esteem by its community. *See Radio Station WABZ, Inc.*, 90 FCC 2d at 841-842. KTTV's reputation is unblemished. No dissatisfied public witnesses were produced, and no letters or affidavits evincing any public dissatisfaction with KTTV's service to the community were introduced into the record of this proceeding. The absence of contravening public witness testimony is significant evidence of KTTV's high standing in its community.

200. Thus, the record demonstrates that KTTV conducted exhaustive ascertainment interviews, supplemented by information derived through extensive community involvement; broadcast a multitude of PSAs on behalf of hundreds of different organizations; presented numerous regularly scheduled and special news, public affairs and general interest programs; provided an effective array of forums for community members and leaders with its locally produced public affairs programs, editorials and PSA production and broadcasts; provided coverage of events of special interest to its community; continuously reached out into the Los Angeles community to promote, organize and support community and charitable activities; and maintained an excellent reputation in the community, unblemished by any criticism.

201. Under the factors traditionally considered by the Commission in determining whether a licensee has rendered a substantial service to its community, it is concluded that the record in this proceeding demonstrates that the past performance of KTTV during the pertinent time period has been substantial. Therefore, Fox is entitled to a strong renewal expectancy preference.

202. Rainbow urges that KTTV should not raise a renewal expectancy because in Rainbow's view, "[t]he public service trend at KTTV was strongly 'downward'." Rainbow Findings, paragraph 244.[20] The Bureau has concluded that the record evidence established that "Fox is entitled to a renewal expectancy." It nevertheless believes that "the overall reduction in KTTV's locally produced non-entertainment and news programming mandates a slight diminution of Fox's renewal expectancy." Bureau conclusions, paragraph 12. Rainbow and the Bureau rely solely on *Video 44*, 5 FCC Rcd 6383 (1990) for their positions. However, their reliance on Video 44 is misplaced. In *Video 44*, where a licensee effected a wholesale abandonment of public service programming after it had become a nearly full-time subscription service, it was held that the programming following the format change, which was found to be wanting, was more probative of its likely future performance than its programming prior to that change. Contrary to the suggestions of the Bureau and Rainbow, in *Video 44*, the Commission did not compare the amount of public interest programming before and after the drastic format change. Moreover, here, unlike Video 44, there was no decline in KTTV's overall commitment to responsive programming and community service. As demonstrated by the record, throughout the licensee period, KTTV ascertained the needs of its community, responded with a variety of programming that met those needs, reached out to the community to assist in charitable and civic activities, and enjoyed the wide support of the public. Because KTTV's overall responsiveness was consistently meritorious, the cancellation of programs or the alteration of its program schedule, which lies wholly within the licensee's discretion, is irrelevant. Neither Commission precedent nor policy supports the elimination or diminution of KTTV's strong renewal expectancy preference. Moreover, this preference is controlling as to the comparative choice between Fox and Rainbow. *See Radio Station WABZ, Inc.*, 90 FCC 2d at 845.

Rainbow's Financial Qualifications At Time Of Certification

203. In specifying a financial issue against Rainbow, the HDO noted that Rainbow was required to respond to a request for documentation of its financial ability pursuant to a Commission authorized random check of applicants seeking to construct and operate new broadcast facilities. Based upon Rainbow's response, the Commission specified an issue relating to the terms and conditions of its bank commitment letter from Bank of America, and whether the letter established a present firm intent to lend the necessary funds for construction.

204. When, as in this case, an applicant seeks to rely on a bank loan for financing of its proposed station, the applicant must demonstrate that at the time of certification it had "reasonable assurance" of the loan's availability. *See Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980). In this regard, "[*a*] *present firm intention to make a loan*, future conditions permitting, is the essence of [the Commission's] 'reasonable assurance' standard." *Id.*

205. In order to determine that an applicant has "reasonable assurance" of available funds based on a bank letter, the following factors are considered:

> Whether (1) the bank has long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2062, 2072 (1979) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, *Christian Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio*, *supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender. As noted above, where these fundamentals have been absent in recent cases, the Board has found no "reasonable assurance." *See, e.g.*, *Rebecca Boedker*, [5 FCC Rcd 2855 (Rev. Bd. 1990)], *vacated* 6 FCC Rcd 2557 (1991); *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7946 (Rev. Bd. 1989). Conversely, where these fundamentals have been satisfied, . . . "reasonable assurance" [has been found]. *See, e.g.*, *Colonial Communications, Inc.*, 5 FCC Rcd 1967 (Rev. Bd. 1990), *recon. denied*, FCC 90R-52, released June 25, 1990.

Scioto Broadcasters, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *aff'd*, 6 FCC Rcd 1893 (1991).

206. To demonstrate that it was financially qualified at the time it so certified, Rainbow relies on a November 18, 1988 letter from Bank of America, signed by Timothy M.

Jenson, vice-president, and alleged oral understandings which Rainbow principal, Esther Renteria claims to have had with Jenson concerning specific terms and conditions which were not set forth in the letter.

207. Rainbow has failed to establish the requisite "reasonable assurance of the "present firm intention" of the Bank of America to make a loan up to $10 million dollars to Rainbow. Renteria has admitted that the November 18 letter is patently deficient on its face and does not provide reasonable assurance of the availability of a loan from Bank of America. In the absence of contemporaneous written documentation, an applicant, such as Rainbow, may be able to establish reasonable assurance of a loan under a financial qualifications issue by adducing "other similar evidence that funds would be available." *Armando Garcia*, 3 FCC Rcd 1065, 1067 (Rev. Bd.), *rev. denied*, 3 FCC Rcd 4767 (1988). However, the Commission emphasized in *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989) that probative evidence of the availability of financing includes more than the self-serving, uncorroborated statement of the individual responsible for the financial certification. *See* also *Susan S. Mulkey*, 4 FCC Rcd 5520, 5522 (1990). Probative evidence as to the existance of an oral loan agreement at the time of certification "must be established by both the applicant and lender via uncontroverted affidavits and/or testimony at hearing." *Port Huron Family Radio, Inc.*, 5 FCC Rcd 4562 (1990). Rainbow, however, has failed to provide probative evidence of an oral agreement with bank officials demonstrating the availability of financing.

208. Rainbow asserts that Renteria reached an oral understanding with bank officials concerning the specific terms which are not contained in the November 18 bank letter. According to Renteria, her informal conversations with Jensen provided her with "reasonable assurance" of the bank's "present firm intention" to make a loan to Rainbow. However, Renteria's account is not corroborated by the bank officials with whom she dealt. In fact, as discussed, below, the bank officials' testimony is in conflict with Renteria in significant respects. Their testimony confirms the fact that the November 18 letter, on which Rainbow relies, was not intended to reflect a present firm intention on the part of the bank to make a loan to Rainbow.

209. The bank letter itself explicitly states that it merely confirms the bank's "willingness to consider a loan of up to $10 million to Rainbow Broadcasting, Inc. after a complete analysis . . . ." According to Jenson, the use of the term "willingness to consider" was significant in that it was meant to make clear to the potential borrower that there was no commitment on the part of the bank. Jensen's testimony that the letter was preliminary to any proposal to lend money on the part of the bank is consistent with the fact that Vasquez and Jensen lacked authority to give Rainbow the commitment it was seeking. Additionally, the inclusion of the term "after a complete analysis further buttresses Jensen's testimony that the letter was preliminary to any commitment which the bank would be willing to make. Thus, it is apparent from the face of the letter as well as Jensen's testimony that it was not intended to reflect a present firm intention on the part of the bank.

210. Also, Bank of America lacked sufficient information about Rainbow and its principals' assets, credit history, current business plan and similar data. Vasquez testified that he was aware that Renteria was a good and frequent customer at his branch, but admitted he had no detailed knowledge of her creditworthiness nor that of fellow investors, nor had he seen any business plan or other relevant financial data. Similarly, Jensen relied upon Vasquez for information about Rainbow and Renteria and had no additional information prior to the time he signed the November 18, 1988 letter. Thus, it is concluded that the bank lacked sufficient information to preliminarily review the individual qualifications of Rainbow and its principals to enable the bank to make any commitment which would satisfy the Commission's "reasonable assurance" standard. *See, Dutchess Communications Corp.*, 101 FCC 2d 243 at 247-248 cited in *Marlin Broadcasting, supra*, 4 FCC Rcd 7945 at 7947; *Cf. Christina Communications, et al*, 2 FCC Rcd 1971, 1974 (*HDO*)

211. The bank letter failed to specify the interest rate, the period of repayment and the precise collateral on which the bank would be relying. Although Renteria had furnished both Vasquez and Jenson with a copy of a draft bank commitment letter (Thompson draft) which her counsel felt would meet the Commission's requirements, the Jensen letter specifically omitted the very terms which the Thompson draft included. Jensen testified that the terms he provided in his letter were "vague generalities versus specific terms and conditions on which they [Bank of America] would consider lending." According to Jensen, the interest rate described in his letter does not provide a meaningful rate of interest because all loans bear interest at a "market rate." Similarly, he explained that his letter did not provide a definite repayment term. Finally, with respect to the collateralization, he opined that there was no specific definition of what the assets were because the bank lacked information to identify them in the letter. The absence of clarity as to the specific collateralization further undermines any "present firm intention" to make a loan. *See, Chapman Radio & Television, supra*, 70 FCC 2d at 2072. Additionally, the bank letter did not include the provision in the Thompson draft which expressly noted that the bank understood "that the company intends by this letter to rely on the bank for a reasonable assurance of its financial qualification to construct and operate the station." Finally, Jensen, the signatory to the letter, was explicit in denying that the bank letter was a commitment letter. In summary, it is clear that the bank letter does not evidence nor was it intended to evidence a "present firm intention" to make a loan and thus does not provide the requisite "reasonable assurance." *See, Rebecca L. Boedker, supra*, 5 FCC Rd 2855 at 2859.

212. Renteria's assertion that the specific terms lacking in the bank letter were established in her conversation with Jensen is uncorroborated and will not be credited. Moreover, Jensen testified explicitly that the reason specific terms and conditions were no longer put in bank letters was to avoid the appearance of making any commitment to a potential borrower. Previous letters had resulted in litigation which was costly to the bank and were the catalyst for the bank's development of a rigorous process concerning the issuance of bank letters. In light of Jensen's understanding of the bank's policy and the bank's prohibition against issuing letters until a thorough review of the loan applicant was conducted, his explanation to Renteria that he could not commit the bank or put required terms in writing, and his lack of authority to issue "reasonable assurance letters", it strains credulity that Jensen would agree orally to specific terms and conditions for making the loan. Simply stated, Renteria was clearly put on notice as to the limitations on Jensen's authority,

on the bank's policy against commitments, and as to the fact that Jensen simply refused to incorporate provisions of the Thompson draft letter into the bank letter. Thus, any claim by Rainbow that it had a reasonable basis for relying on Bank of America funding is unfounded.

213. It is, therefore, concluded that Rainbow lacked "reasonable assurance" of Bank of America's "present firm intention" to lend the necessary funds. Since Rainbow has failed to demonstrate that it was financially qualified at the time it so certified, Rainbow is disqualified.

Rainbow's Current Financial Qualifications

214. Rainbow seeks to amend its application to substitute a February 6, 1991 letter to Renteria from Far East National Bank (FENB) in lieu of the Bank of America letter. The FENB letter (Rainbow Ex. 8) was accepted on a contingent basis pending a determination whether Rainbow was financially qualified at the time it so certified. In light of the adverse determination on this issue, Rainbow's present reliance on the FENB letter is moot. It is well established that not only must an applicant currently have reasonable assurance of financing, but such reasonable assurance must also exist at the time the applicant certifies as to its financial qualifications. *Shawn* Phalen, 5 FCC Rcd 2622 (Rev. Bd. 1990). In the absence of a demonstration by the applicant that it had reasonable assurance of financing at the time of certification, subsequent petitions for leave to amend financial proposals are disallowed. *Aspen FM, Inc.*, 5 FCC Rcd 1602 (1991).

215. *Assuming, arguendo*, the FENB letter was considered, Rainbow has failed to establish it is currently financially qualified. The FENB loan requires syndication of at least 6 million dollars of the 10 million dollars specified in the loan letter. FENB has not syndicated any loans for broadcast properties in the past. FENB's chairman and president Henry Hwang believes the loan could be syndicated successfully. However, he conceded that he has not spoken with other banks regarding participation in the proposed loan.

216. Rainbow's showing fails to provide reasonable assurance of the availability of FENB funds. Hwang's personal belief that the loan could be syndicated successfully is immaterial. *See KIST*, 99 FCC 2d 173, 179-180 (Rev. Bd. 1984). More is required before the loan can be relied on. Even if it were customary for FENB to arrange loans in excess of its statutory limitation, Rainbow could not demonstrate reasonable assurance unless it received some commitment from the participating banks. *See CBS, Inc.*, 49 FCC 2d 1214, 1229 (Rev. Bd. 1974). At the bare minimum, Rainbow would have had to demonstrate that corresponding banks have agreed to participate in the loan. *See Corpus Christi Cellular Telephone Co.*, 3 FCC Rcd 1889, 1891 (1989). *See* also *Intercontinental Communications/Cellular, Inc.*, 4 FCC Rcd 2702, 2704 & n.24 (1989). Since FENB has not even contacted any banks, let alone secured loan commitments from them, Rainbow can not rely on the FENB letter for reasonable assurance.[21]

Ultimate Conclusions

217. Rainbow has been disqualified for its lack of financial qualifications. Rainbow's disqualification moots the need for a comparative determination. *See Louis Adelman*, 28 FCC 432 (1960), *recon. denied*, 29 FCC 1223 (1960), *aff'd sub nom. Guinan et al v. FCC*, 297 F.2d 782 (D.C. Cir. 1961). Moreover, Fox has established a record of past performance that warrants a dispositive renewal expectancy preference.

Accordingly, IT IS ORDERED, That the "Petition For Leave To Amend filed March 21, 1991 by Rainbow Broadcasting, Inc. IS DISMISSED as moot.

IT IS FURTHER ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[22] the application of Fox Television Stations Inc. for renewal of license of Station KTTV(TV), Los Angeles, California IS GRANTED; and the application of Rainbow Broadcasting, Inc. for construction permit in Los Angeles, California IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] "Attributable media interests" are those interests contemplated by Section 73.3555 of the Commission's Rules (Fox Ex. 1, p. 3; Tr. 169-172).

[2] Because some community leaders represented more than one category, the number of representative ascertainments exceeds the total number of interviews conducted.

[3] KTTV Program Director, Don Tillman, who sponsored Fox Exhibit 2, testified that he was responsible for the overall supervision of the station's ascertainment efforts (Tr. 402-403, 566-568). Rainbow did not cross-examine Tillman as to any aspect of the ascertainment process, and did not introduce any evidence rebutting Fox Exhibit 2.

[4] As a result of a typographical error, Fox Exhibit 3 inadvertently indicated the end date of "PM Magazine" as August 29, 1988 (Fox Ex. 3, p. 5). The correct date is August 29, 1986.

[5] Averages are derived from News Department records for each calendar quarter during the renewal period (Fox Ex. 4, p. 2; Tr. 477).

[6] Renteria testified that her communications counsel cited the *Susan Mulkey* case to her in support of this position, but later could not recall whether this occurred before the November 1 filing of Rainbow's application or after (Tr. 804, 889). In *Susan Mulkey*, 4 FCC Rcd 5520, 5522 (1989), *recon. denied* 5 FCC Rcd 3075 (1990), the Commission held that uncorroborated oral assurances are not sufficient to resolve all questions concerning the validity of a financial certification.

[7] However, Jenson testified that he did not know Vasquez nor recall any discussions with him (*See* paras. *105-111, infra.*).

[8] During her early conversations with Vasquez, Renteria asked if he was having a problem with Rainbow's loan request, because the bank had been sued successfully many times on similar commitment letters. When he answered "Yes she asked if his "comfort level" would be increased if she furnished him with a "hold harmless" letter. When he indicated that it might help she drafted and gave Vasquez a "hold harmless" letter dated November 10, 1988, in which Rainbow agreed to hold the bank harmless should Rainbow fail to qualify under whatever terms would be in effect when Rainbow received its license from the FCC

(Rainbow Ex. 17; Tr. 701-702, 891, 1237). Vasquez recalled seeing the document and believed he probably passed it on to Jenson (Tr. 1202).

[9] Pursuant to Thompson's suggestion, Renteria faxed information to Lem Daniels about the project to see what his company could do. Daniels had previously done some financing, but he told Rainbow that because of market conditions, he was no longer doing any financing. (Rainbow Ex. 14; Tr. 869-870).

[10] However, Jenson testified only that he recalled a brief conversation or conversations with someone from Rainbow (*See* paras. 167-172 *infra).*

[11] The collateralization provision in the Thompson draft is markedly different from that in the November 18 bank letter. The Thompson draft provided that the loan "would be collateralized by the operating assets of the station." The November 18 letter, however, defined collateraassets *acceptable to the Bank including* all the operating assets of the station. (Emphasis added).

[12] Renteria's written testimony that Rainbow's FCC counsel had "confirmed her "oral understanding" was rejected as inadmissible hearsay. (Tr. 312). In this connection, Renteria was not a party to any conversations between Jensen and Rainbow's counsel. Accordingly, because Rainbow elected not to present counsel as a witness, it cannot rely on his purported conversation with Jenson to substantiate the existence of Renteria's "oral understanding" (Tr. 303-305).

[13] Jenson, who was represented by an attorney provided by the Bank of America, no longer worked at the Bank of America at the time he testified. (Tr. 1015-1020).

[14] On the other hand, his response of November 7, 1988, was a typical letter he sent out 10-30 times a month and would not require counsel review. (Tr. 1066).

[15] Jenson provided an extensive explanation of the process by which an initial inquiry from a prospective borrower evolves into a loan commitment. (Tr. 1046-1048, 1096-1097, 1101-1103, 1123-1126).

[16] Rainbow Exhibit 8 was accepted on a contingent basis pending a determination whether Rainbow was financially qualified at the time it so certified (Tr. 364-368). Consideration of Rainbow's March 21, 1991 Petition for Leave to Amend specifying FENB as its proposed funding source is moot since it has been concluded that Rainbow was not financially qualified at the outset.

[17] *Multi-State Communications, Inc. v. FCC*, 590 F.1d 1117, 44 RR 2d 487 (D.C. Cir. 1987).

[18] *Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Belo Broadcasting Corp.*, 47 FCC 2d 540 (1974).

[19] *United Church of Christ*, 359 F.2d at 1007.

[20] Rainbow also criticizes Fox for failing "to even attempt to quantify the total amount of its non-entertainment programming to its total programming. In so doing, Rainbow errs by focusing on quantitative data as the benchmark of the licensee's performance. Specifically, the Commission no longer emphasizes quantitative programming data when assessing the strength of a licensee's performance. In its *Report and Order, Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 66 FCC 2d 419 (1977) the Commission declined to establish quantitative standards for defining substantial program service that would determine entitlement to a renewal expectancy in comparative renewal proceedings. The Commission stated that quantitative standards "are a simplistic, superficial approach to a complex problem." *Id.* at 429. In 1981, the Commission restated this view when it eliminated its percentage guidelines for nonentertainment programming and deleted any quantitative showing of programming performance from the license renewal application. In explaining its action, the Commission asserted that there "was no valid nexus between the current guideline and the rendition of substantial service in the comparative context." *Deregulation of Radio*, 84 FCC 2d 968, 986 (1981). In summary, as the Review Board stated in *Intercontinental Radio, Inc.*, 98 FCC 2d 608, 630-631 (Rev. Bd. 1981), "the proper focus in reviewing an incumbent licensee's record in a 'comparative renewal' case is a *qualitative* and not *quantitative one*." Accordingly, the absence of comparative data is not material to the issue of determining Fox's entitlement to a renewal expectancy.

[21] Rainbow's reliance on *Rural Cellular Rules*, 4 FCC Rcd 254, 2550 and n.9 (1988) does not assist it. In *Rural Cellular Rules*, the Commission merely reiterated that loan syndication is a standard practice where a proposed loan exceeds the initiating bank's lending limit. However, the Commission did not indicate the circumstances under which a syndicated loan may be relied on for reasonable assurance of an applicant's financial qualifications. Also, Rainbow's reliance on *MacFadden Acquisition Corp.*, 104 FCC 2d 545, 567-568 (1989) is misplaced. There, MacFadden's claim of reasonable assurance to consummate a hostile takeover was predicated on a letter from the lead bank as well as a letter which confirmed that MacFadden's investment advisor was intimately familiar with MacFadden and his takeover proposal and stated that, based on its "experience and financial reputation in the financial markets" it was "highly confident" of the success of both a proposed loan syndication and a sale of debentures. The Commission concluded that taken together, the bank letter and the "expert letter" were sufficient to establish MacFadden's reasonable assurance. *Id.* at 568. Unlike MacFadden, Rainbow is seeking a construction permit for new facilities. Also, all of the germane facts underlying the rationale of MacFadden are absent from this case.

[22] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commissoin does not review the case of its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 16, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PETITION FOR WAIVER FILED BY PALMERTON TELEPHONE COMPANY OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On May 8, 1992, Palmerton Telephone Company (Palmerton) filed a petition for waiver of the equal access implementation requirements for independent telephone companies. Palmerton requests an additional six months to complete equal access conversion. Palmerton states that in November 1989, it received a letter from MCI Telecommunications Corporation (MCI) requesting that Palmerton convert its end offices to equal access. Pursuant to Commission order, Palmerton is required to complete the equal access conversion of end offices equipped with stored program controlled (SPC) switches within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985). The three-year time period will end November 1, 1992. Palmerton seeks an additional six months, until May 1, 1993, to complete its equal access conversion.

According to Palmerton, equal access conversion requires upgrades in its equipment. Palmerton states that the new equipment was ordered and tested, but software and hardware problems were uncovered during the trial period. Palmerton states that the software vendor is currently testing the software to ensure its reliability. Palmerton states that, due to equipment problems beyond its control, it will require additional time to test and install the new equipment. Palmerton anticipates completing the equal access conversion by May 1993. Palmerton states that it has notified MCI of the delay, and MCI has no difficulties with delaying the conversion.

Interested parties should file comments on the petition by **July 6, 1992**, and reply comments by **July 28, 1992**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of the petition can be obtained from Downtown Copy Center at (202) 452-1422.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOM*USA, INC.,
and its subsidiaries,
Complainant,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-362
NORTHWESTERN BELL TELEPHONE COMPANY, and	File No. E-90-363
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-90-364

Defendants.

ORDER

Adopted: June 5, 1992; Released: June 17, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Telecom*USA, Inc. and its subsidiaries (Telecom*USA), may be entitled to recover damages as a result of defendants'[1] alleged violation of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that Telecom*USA presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Telecom*USA's damage claim rests primarily on the contention that the proper measure of the damage it has incurred as a result of defendants' alleged violations of the Commission's rate of

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[1] Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company, and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaints, however, were filed prior to the consolidation. Accordingly, we shall refer to the defendant carriers as they were named in the complaints.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] The complainants relied, as does Telecom*USA in the instant complaint, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

return prescription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. Defendants raise a number of challenges to complainant's damage claim, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. Defendants argue that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainant when their overall interstate rate of return was below the authorized level.[10] Defendants also contend that an award of damages based on the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Telecom*USA may have suffered actual damage as a consequence of defendants' alleged violation of the Commission's rate of return prescription. We tend to agree with Telecom*USA, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support its claim that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by defendants that would tend to show that Telecom*USA's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Telecom*USA's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute Telecom*USA's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainant information necessary to compute the difference between the amount complainant actually paid for defendants' access services during the relevant monitoring period and the amount complainant would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[11]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this order, complainant may direct to defendants a written request for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

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[8] Telecom*USA also seeks interest on this amount. We note that the defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,034 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] Additionally, the defendants contend that the relevant overall interstate rate of return is that of their parent holding company, U S West. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990).

[11] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

9. IT IS FURTHER ORDERED THAT complainant and defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-350

In re Applications of

EMISION DE RADIO BALMESEDA, INC.	File No. BPH-870505MA
SAFE CARE, INC.	File No. BPH-870505MB
CHAMELEON BROADCASTING, INC.	File No. BPH-870506MH
DALE BROADCASTING, INC.	File No. BPH-870506MK
FIRST COAST RADIO, INC.	File No. BPH-870506MN
LEEANN KENDALL SCOPINICH	File No. BPH-870506MQ

For Construction Permit for a
New FM Station on Channel 293A
in Ponte Vedra Beach, Florida

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1992; Released: June 22, 1992

By the Review Board: BLUMENTHAL and GREENE. Board Member ESBENSEN absent.

1. The Board has before it the *Initial Decision,* 6 FCC Rcd 5239 (1991) (*I.D.*), of Administrative Law Judge John M. Frysiak (ALJ) in the above-captioned proceeding. It also has before it the exceptions and replies of the parties.[1] Oral argument was held on December 6, 1991.

2. Whereas the *I.D.* found First Coast to be the superior applicant under the *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965), the Board's review of the record and the exceptions revealed, in part, that none of the applicants was entitled to ownership/management integration credit. Because this determination plainly changed the entire complexion of the comparative case, the Board requested that the parties file supplemental briefs addressing the question of comparative superiority, assuming that none of the parties were to receive integration credit. *Memorandum Opinion and Order,* 7 FCC Rcd 2363 (Rev. Bd. 1992).[2] However, after considering the supplemental responses of the parties, the Board finds that although it had hoped to avoid a remand on several issues generated by the exceptions, no award can be made on the existing record, and we are compelled instead to try issues against three of the applicants before we can vouchsafe the award of this Construction Permit. In order to explain in full our reasons, it is most useful to do so comprehensively in the context of the exceptions to the *I.D.*[3]

DIVERSIFICATION

3. Under the 1965 *Policy Statement,* diversification of the mass media is declared to be the Commission's comparative factor of "primary" importance, *see* 1 FCC 2d at 394. Of the six remaining applicants, only Emision de Radio was charged with cognizable media interests. *I.D.*, para. 110 (principal holds interests in two Florida radio stations as well as controlling interest in stations in Georgia and Nevada).[4] Emision's exceptions do not directly challenge the ALJ's diversification reckoning. Rather, it asserts that the Policy Statement's focus on diversification was "ill-conceived" from the outset and that "diversification should no longer be a factor for comparison between applicants for new facilities."[5]

4. Although the Commission is, in fact, in the process of seeking comments on its 1965 comparative criteria, *see Reexamination of the Policy Statement on Comparative Broadcast Hearings,* 7 FCC Rcd 2264 (1992), the Board has no warrant to anticipate the outcome of that proceeding or to depart from the 1965 *Policy Statement. See Bechtel v. FCC,* No. 91-1112, slip op. at 7 (D.C. Cir. Jan. 31, 1992)(Board "lack[s] authority" to disregard *Policy Statement).* Hence, from a comparative standpoint, Emision must suffer a moderate demerit *vis a vis* all qualified applicants that here have no attributable media interest(s). On that point, the *I.D.* is affirmed without modification.

INTEGRATION

5. Next to media diversification, the 1965 *Policy Statement* places a heavy premium on the day-to-day integration of ownership with station management. 1 FCC 2d at 395.[6] The *I.D.* awarded a 100% quantitative integration factor to three of the applicants (Safe Care, First Coast, and Scopinich), and it denied such credit to Dale Broadcasting. Emision de Radio sought no such credit and Chameleon Broadcasting was disqualified absolutely on its finances. We address, *seriatim,* the pertinent integration exceptions below.[7]

6. *Safe Care.* Safe Care originally filed as a Florida Corporation organized by Robert T. Hinton, its sole stockholder and director. *I.D.*, para. 16. On July 16, 1987, however, the applicant amended its Articles of Incorporation to create a second tier of (Class B) non-voting preferred stock; and, six days later "at the end of the amendment as of right cut-off date," Safe Care amended its FCC application in several fundamental ways. First, Robert Hinton (and his daughter) "abandoned their voting stock and became holders of [the] newly created Class B non-voting stock." *Id.*, at para. 18. Second, all of the voting stock in the corporation came to rest in the hands of Hinton's grand-nephew, Bradlee E. Cox (51%) and his wife, Cheryl D. Cox (49%).*Id.*, para. 16.[8] And, third (*id.*, at paras. 21-22):

> The voting and non-voting shareholders of Safe Care have also entered into an Option Agreement for Owners of Preferred Stock to Sell to Owners of Common Stock ("Option Agreement") (Chameleon Exh. 8). The Option Agreement gives the non-voting shareholders the option, at any time after the com-

> mencement of program test authority, to force the voting shareholders to purchase all or part of the outstanding non-voting stock at fair market value (Chameleon Exh. 8, p. 2; Tr. 70-71; Chameleon Exh. 9, p. 1).
>
> * * *
>
> If, for any reason, the voting shareholders are unable to purchase all of the non-voting shares, the non-voting shareholders may force the voting shareholders to sell their shares to the nonvoting shareholders or to a third party (Chameleon Exh. 8, pp. 7-8; Tr. 72-73). The decision as to whether the voting shareholders' share would be purchased by the non-voting shareholders or sold to a third party rests entirely with the nonvoting shareholders (Chameleon Exh. 8, pp. 7-8).

7. Relying, *inter alia*, on *Signal Ministries, Inc.*, 104 FCC 2d 1481 (Rev. Bd. 1986),[9] "[f]our of the six competing applicants would deny any credit for Safe Care's integration proposal" inasmuch as the Coxes made no colorable showing that they had, or could very readily secure, the resources to forefend the reacquisition of the voting stock by the Hintons on the Option Agreement deadline date. *I. D.*, para. 111.[10] However, opining that "[c]ontentions that the Coxes will not have sufficient finances or access to financing to effect the future purchase of the non-voting stock are purely speculative," *id.*, the ALJ awarded Safe Care a 100% integration factor.

8. We agree with the exceptions. As we again recently iterated:

> In *Signal Ministries, Inc.* . .. the Board rehearsed the long-standing doctrine that "[w]here... it is *unlikely* that a convertible interest will be exercised, the potential ownership interest will have no impact on the comparative analysis." 104 FCC 2d at 1491 (emphasis added) (*citing Washington's Christian TV Outreach, Inc.*, 99 FCC 2d 395, 410, 414 (Rev. Bd. 1984)(subsequent affirmances omitted)).
>
> In *Signal Ministries* and *Washington's Christian*, we did forbear from attributing equity interests convertible to active status because the preponderance of record evidence in each specific case persuaded us that conversion was unlikely for the (then) forseeable future.

Barry Skidelsky, 7 FCC Rcd 1, 3-4 (Rev. Bd. 1992)(quoting *Channel 32 Broadcasting Co.*, 5 FCC Rcd 7373, 7376-77 (Rev. Bd. 1990)). Here it seems clear that Safe Care has not begun to meet its legal burden of supplying evidence that shows the "unlikelihood" that the Hinton optionholders (or a third party) will not soon (re) acquire control of the corporation, for as the ALJ himself reported:

> Mr. Cox testified that, if he could not buy the non-voting stock out of cash flow, he would borrow the money from a bank or would rely on Mr. Hinton to arrange the financing (Tr. 73-74).

I.D. at para. 23. Indeed, the notion that the Coxes might have to rely for financing on *Hinton*, at whose option the Coxes themselves might be soon divested, speaks perfectly to the frailty of their hold on corporate control. To the extent that the question of near-term control over Safe Care's voting stock is "speculative," it is the *Coxes* who rely on utter conjecture, *not* the exceptors. The record, to say the least, shows no likelihood that the Coxes will long control this applicant corporation,[11] and, therefore, we find its integration proposal to be tenuous and unreliable. The well-taken exceptions on this point are granted and no credit is awarded.

9. *Dale Broadcasting.* The ALJ denied Dale integration credit on two discrete grounds. First, although this applicant's president, Willie James Martin,[12] had herein proposed (a) to integrate full-time into this station and (b) to divest all of his media interests should this application be granted,[13] the ALJ observed:

> On September 6, 1989, one week after Dale filed its Integration Statement in this proceeding, Mr. Martin amended his Ensley, Florida, application to report that *"[s]hould Mr. Martin be awarded a ConstructionPermit for the proposed Ensley Station he will resign his employment and divest these ownership interests and all others."* (First Coast Exh. 3 p. 2; Tr. 626-30). On December 14, 1989, Mr. Martin filed a second amendment to his Ensley application stating that his earlier divestiture pledge had been made in error. Instead, Mr. Martin reported that: *"[i]t was not then and is not now my intention to divest any media interests should my application for Ensley be granted."*

I.D. at para. 83 (emphasis added). Because Martin's Ensley, Florida proposal was in patent and irreconcilable conflict with his earlier-filed integration pledge in this proceeding, the ALJ rejected his integration proposal here. *Id.*, paras. 124-125.

10. Second, the ALJ found that Martin had made "numerous misstatements" pertaining to his purported personal residence on the "outer periphery of Dale's proposed service area,"[14] and that "given the repeated misstatements offered by Mr. Martin his testimony is not credible and cannot be accepted on behalf of Dale's claimed integration credit." *I.D.* at para. 126.

11. Given the recent decision in *Richardson Broadcast Group*, 7 FCC Rcd 1583 (1992), where -- even in the absence of any designated character issue -- the Commission affirmed the ALJ's holding of lack of candor by another broadcast applicant, the Board might likewise defer to this ALJ's judgment that Martin lacks the requisite credibility for licenseeship. In that regard, we do not accept Dale's contentions that, although "[a]dmittedly there were some inconsistencies"[15] in Martin's testimony, these were "minor" and "there was some confusion in Mr. Martin's mind about the status of his voter registration in Jacksonville and his Florida driver's license."[16] Upon a *de novo* review of the record, this Board has no substantial *evidentiary* basis on which to reverse the ALJ's credibility findings.

12. Similarly, we will not overturn the ALJ's conclusion that Dale cannot receive credit here in the face of Martin's patently conflicting declaration attending his (later-filed) Ensley, Florida application. Dale readily stipulates (a) that its Ponte Vedra Beach "integration proposal was frozen on

August 31, 1989, when it filed its integration proposal and it may only be subsequently downgraded..."[17] and (b) that the inconsistent Ensley proposal was formally on file with the Commission until Martin's deposition testimony in December 1989, only *after* which Martin hastily reacted "by withdrawing his previous divestiture pledge in the Ensley proceeding."[18]

13. Instead, Dale contends that "Mr. Martin did not become aware of [the conflict] until his deposition in this proceeding in December, 1989,"[19] and that his Ensley submission, by alleged error of counsel, "inadvertently included a statement indicating that Mr. Martin would divest all of his [other] media ownership interests if the Ensley application were granted."[20] However, we agree with the ALJ that the convenient and *post hoc* defense of counsel error has no extrinsic record support (even if that defense was *not* legally uncompelling, *see generally Asheboro Broadcasting Co.*, 20 FCC 2d 1, 3 (1969) (conduct of "counsel cannot excuse a clear breach of duty"); *Carol Sue Bowman*, 6 FCC Rcd 4723 (1991)), and that Martin must be fairly charged with, at least, constructive knowledge of his own conflicting integration/divestiture promises submitted formally to this Commission. In the face of Martin's glaringly inconsistent pledges here and in Ensley, Dale can receive no integration credit. *See Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432, 2438-39 (Rev. Bd. 1990), *modified on other grounds*, 6 FCC Rcd 721 (1991) (*remanded sub nom. Bechtel, supra.*)[21]

14. *First Coast.* Safe Care, Dale and Scopinich except vigorously to the 100% integration credit awarded to First Coast. After a review of the record, in its totality, we must agree with the exceptors that the First Coast integration claim is wholly unreliable and "involve[s] 'strange and unnatural' business relationships" of *precisely* the genre that prompted the court's rebellion in *Bechtel* (*see* slip op. at 14). Although, largely due to First Coast's evidentiary lapses, some of the facts are not as clear as possible, the facts that *are* known undercut deeply the First Coast proposal before us.

15. It appears that this application had its genesis in the spring of 1987 when William M. McCormick, the sole owner of licensee McCormick Broadcasting, initiated a telephone call to Edmund C. Bunker, a 75-year old broadcast retiree who has lived in Ponte Vedra Beach since 1975, to adduce an interest in joining in an application for the station. At the time of the call, McCormick and Bunker were total strangers, Tr. 1039-1040; and, so far as the record shows, they met subsequently only once, briefly, at an April 1987 meeting. *See I.D.*, para. 88. Howbeit, First Coast originally organized with two intended active stockholders, Bunker and a close personal friend, local real estate developer James R. Stockton. *Id.*, para. 87. A third principal, Ted Shaker, was included because, as Bunker indicated, Shaker "spends a lot of time in Ponte Vedra and... as time goes [by] Ted might move to Ponte Vedra Beach *where he could participate in the operation of the station.*" Tr. 1089 (emphasis added). Again, and nevertheless, Shaker -- like McCormick -- was depicted on the FCC application as a "passive" owner. *I.D.*, para. 85. But, allegedly, Stockton subsequently exchanged his 25% voting stock interest to non-voting; and in 1990, Stockton is said to have simply passed even this "passive" interest over to his son. *Id.*, para. 86. Not only do no corporate records support the supposed change in Stockton's original status, First Coast's Annual Corporate Reports to the state of Florida, up to and including its 1989 report, list Stockton, McCormick *and* Shaker as its *active* directors. *See* Scopinich Exh. 10. Without any explanation, Bunker asserted later that these state filings by him were "a mistake."*See* Tr. 1405-08 (oral argument).

16. Another unexplained Bunker "mistake" occurred in his financial certification to First Coast's application. Instead of certifying "yes" or "no" in Section III of its application, First Coast simply typed: "Not applicable." *See* Tr. 1052. Bunker, who allows that this entry was made at his direction, acknowledged this "error" and "explained" only: "Yes, and it was a complete goof. It was wrong." Tr. 1053.[22] Still other aspects of First Coast's application erode the claim that Bunker was, is, and will be in exclusive "control" of this operation. First, while Bunker certified the engineering portion of the application (as well as the aforementioned financial portion), Bunker could not recall whether he saw the engineering section of the application *before* or *after* he personally certified the application. Tr. 1050-52. Second, and even more revealing, is that not only did Bunker neglect to sign the form's EEO section, Tr. 1099, 1101, Bunker was almost totally unfamiliar with the organizations listed in its Model Program, *see* Tr. 1056; and he later conceded his essential unfamiliarity with that program:

> I went over it, I read it over. *I devoted no deep study to it.* So many things have been too much bits of paper have been coming by, sent by my attorney to sign, do this and do that, so I can't tell you. A reasonable amount, I thought.

Tr. 1100 (emphasis added).[23]

17. On this tatterdemalion record, we can place no confidence whatsoever in either the purported corporate structure or in the attempted depiction of Bunker as First Coast's "controlling" management principal. For reasons that will show even *more* clearly in our discussion of the basic financial issue we must also add, *see infra* paras. 28-31, Bunker's unexplained "mistakes" and his near total ignorance of many critical portions of this application vitiate any legitimate claim that he, alone, is the "master" of First Coast. *See Cuban-American Limited*, 5 FCC Rcd 3781, 3786 n. 4 (1990)(no credit granted where marked ignorance of application details "undermines the reliability of ... proposals to be *meaningfully* integrated into management") (emphasis added); *see generally also Coastal Broadcasting Partners*, 6 FCC Rcd 4242, 4248-49 (Rev. Bd. 1991), *modified on other grounds*, 7 FCC Rcd 1432 (1992). The exceptions on this point are granted; no "meaningful" integration of ownership accrues to First Coast on the this record evidence, that is certain.

18. *LeeAnn Kendall Scopinich.* In view of her pledge to integrate full time as general manager of her station, the ALJ awarded her also with a 100% integration credit. Because we agree completely with First Coast's exceptions to this award, we cannot affirm the *I.D.* on this factor.

19. At the time of filing her Integration Statement (Scopinich Exh. 1 (February 6, 1990)), she reported that she was living in St. Augustine and was "currently" Director of Information for the St. Johns County Chamber of Commerce. With respect thereto, she averred that (*id.*) :

> In the event of a grant I will terminate all outside employment and reside in Ponte Vedra Beach.

On November 27, 1991, Scopinich amended her application to report that "[o]n November 4, 1991, I started as sales manager of WFOY-AM and WUVU-FM, St. Augustine, Fl." That late 1991 amendment went on to state that (id.):

> In the event I am granted the license for the new FM station at Ponte Vedra Beach, Florida, I will give up my employment in order to devote my full time and attention to the Ponte Vedra Beach station.

20. However, between those two filings, certain events occurred that were not fully disclosed by timely amendment, and these intervening events constitute the basis for First Coast's persistent grievance. Thus, in testimony given in July 1990, and responding to a request by the ALJ to bring her work history up to date, Scopinich -- for the first time -- reported that "now I own and operate a restaurant on St. Augustine Beach." Tr. 1144-45. In answer to cross-examination by First Coast counsel, Scopinich testified that, since early March 1990, she and her husband, co-owners of a 38% interest in the Sunset Grille, had been and were then busily engaged "full time" in the operation of her restaurant. Tr. 1156-1157.[24] Although Scopinich counsel had (mis)informed the ALJ that an amendment had been filed disclosing both her ownership *and* full-time devotion to the restaurant Tr. 1154, three critical facts stand out.

21. First, the subject June 1990 amendment nowhere disclosed her *ownership* interest in the restaurant, nor did it disclose that Scopinich was personally working full-time in its day-to-day management.[25] Second, the restaurant was not, as the amemdment reported, in Ponte Vedra; it was, in fact, nearly 25 miles away in St. Augustine Beach. And, third, although the subject Scopinich amendment was attended by her sworn declaration that the information contained therein was, "under penalty of perjury... true and correct to the best of my knowledge and belief," she attempted on the stand to excuse the relevant omissions and/or errors by testifying that she had never reviewed the amendment before filing with the FCC, but merely swore her oath "in blank." Tr. 1154-56.[26]

22. First Coast's exceptions assert that[27]:

> Although Ms. Scopinich had previously committed to terminating her employment if her application was granted (Scopinich Ex. No. 1), she never addressed the matter of her ownership in the restaurant and the significant managerial role she had undertaken at that business. There is no record evidence that she has undertaken any steps to sell her interests in the restaurant or otherwise accommodate her full-time position at her family owned business. As pointed out by First Coast, Scopinich's new business/employment commitments raise serious questions as to the validity of her bare integration pledge. The burden is on the applicant to allay any serious questions which may bear upon the likely effectuation of an integration pledge, *Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 687 (Rev. Bd. 1986). More specifically, the Commission holds that it is the applicant's obligation to make a "specific record showing" of how it will accommodate its outside interests to its proposal, *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7951 (Rev. Bd. 1989). Scopinich has provided absolutely no information as to how she will accommodate her newly acquired ownership interest in the start-up restaurant business where she has a full-time commitment to manage a large staff while simultaneously undertaking the start-up and management of a new radio station.

Scopinich's reply counters that[28]:

> Unlike the cases cited by First Coast, however, no question whatsoever regarding Ms. Scopinich's ability to extricate herself from her involvement in the restaurant was apparent from the nature of the interest or suggested by any party. LeeAnn Scopinich committed herself unequivocally to terminate all outside employment and work full time at the proposed radio station both before and after acquisition of the restaurant interest and there was no record suggestion that any further time was ever devoted to the interest beyond that spent working in the restaurant. There is thus no such "serious question" of ability to effectuate the proposal created by "strong circumstantial evidence giving rise to inevasible doubts," *Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 687, 59 RR 2d 1617, 1630-1631 (Rev. Bd. 1986), as would give rise to a burden on Scopinich to demonstrate how she can effectuate her commitment.

23. We reject Scopinich's glib argument. It is an ironclad imperative of comparative case law that, if a pending applicant owns or acquires a significant business interest, the applicant (a) must disclose fully the nature of that business interest; and (b) provide a "specific credible plan for accommodating these outside interests with his [her] plan for full-time integration" into the proposed station. *See, e.g., Naguabo Broadcasting Co.*, 6 FCC Rcd 4879, 4880 (1991). *Cf. Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 792-96 (Rev. Bd. 1984) (a post cut-off business acquisition "accompanied by a *contemporaneous pledge to divest*, if the applicant is successful in the instant hearing, will not be counted against that applicant")(emphasis added)(subsequent history omitted). Here the facts reflect that, although Scopinich acquired an appreciable interest in a St. Augustine Beach restaurant in March 1990, neither her ownership interest nor her full-time devotion to that enterprise was fully (or timely) reported. Further, nowhere in the record -- either in her erroneous (and hence misleading) June 26, 1990 amendment or in any *later* filing -- did Scopinich submit a "specific credible" plan for accommodating her ongoing restaurant ownership in St. Augustine Beach with her full-time ownership integration proposal in Ponte Vedra Beach. Indeed, when specifically asked about this point at oral argument, and queried as to whether Scopinich had intended to divest her restaurant interest, her counsel responded:

> You know, to be honest with you... I wouldn't hazard a guess, *but I am sure that she did not say she would divest the ownership interest. I think it had to do with whether or not she would take time, you know, that she would work at the restaurant.*

Tr. 1402 (emphasis added). Neither shall we "hazard a guess."[29] But we do accept as fact counsel's commendably candid stipulation that "she [Scopinich] *did not* undertake to divest herself of the ownership interest of the restaurant...."*Id.* (emphasis added).[30] In consequence, we grant the First Coast exceptions and vacate Scopinich's integration credit. *See also infra* paras. 32-35 (financial issue added); paras. 36-38 (misrepresentation/lack of candor issues added).

FINANCIAL QUALIFICATIONS

24. *Chameleon Broadcasting.* The *I.D.*, after resolving a financial misrepresentation issue in Chameleon's favor, nonetheless disqualified it on a *basic* financial qualifications issue. *I.D.*, para. 106. The essential facts, set out *id.*, at paras. 5-11, are these: Chameleon's certification was based upon an April 4, 1987 letter from Mr. and Mrs. Robert Jones, who were acquainted with a minor (11%) Chameleon principal, Holly Onosko, which letter read as follows:

> To Whom It May Concern:
>
> I am writing in regards to the FM application for FM Channel 293 filed by Chameleon Broadcasting, Inc. I am familiar with the applicants and am anxious to negotiate the financing of the project in the event that Chameleon is awarded the license. We anticipate financing of approximately $500,000.

However (1) no serious loan terms had been negotiated, *id.*, para. 6; (2) Chameleon was never privy to the Jones' financial resources, *id.*, para. 7; (3) Chameleon never provided the Jones' with cost estimates for the station or financial information about its own principals, *id.*, para. 8; and, finally (4) in the autumn of 1989, the Jones' withdrew any prior interest expressed in negotiating a loan to construct and/or operate the station.

25. Chameleon does not greatly dispute the findings of the *I.D.*, but it maintains that it did have reasonable assurance of financing because the "life style" of the Jones' suggested wealth, *see* Tr. 1385-86, and because while Mr. Jones had "offered" financial documentation, Chameleon, *mirabile dictu*, declined to accept any such documentation on the advice of counsel. Tr. 1386-91. It also maintains[31]:

> The Commission's recent decision in *Northampton Media Associates*, 4 FCC Rcd 5517 (1989), *recon. denied*, 5 FCC Rcd 3075 (1990), modified the standards for determining whether an applicant properly certified its financial qualifications. Applicants such as Chameleon, who filed their applications before the 1989 revisions to the Form 301 application "may prepare and submit supporting documentation after certification, provided that the applicant actually had reasonable assurance of adequate funds at that time of certification.

26. We must affirm the *I.D.* Chameleon is incorrect in asserting that the Commission's decision in *Northampton*, after the fact, pushed Chameleon into compliance with a "new" financial standard. In fact, as the court later observed, until the Commission softened the Board's precedents in that decision, the Board's long-held standard was considerably more taut, to wit:

> the *sine qua non* for financial qualifications under prior case precedent and the new qualification procedure is written documentation.... [The 1981 Form 301] *continues to require written documentation to support "reasonable assurance" of funds. The only change is that now the documentation need not be submitted* in the application process unless requested by the Commission.... [W]here individuals are providing funds, they must... support their undertakings with balance sheets or financial statements.

Northampton Media Associates v. FCC, 941 F.2d 1214, 1216 (D.C. Cir. 1991)(internal citation omitted)(original emphasis).[32] Moreover, it is clear from the Jones' letter itself that no firm loan agreement had ever been reached: the Jones' merely indicated an interest "to negotiate the financing of the project," and the record is equally clear that no such "negotiation" ensued. Indeed, the Jones' withdrew even *that* nebulous offer.

27. Finally, the Commission's bedrock requirements for a valid financial certification were laid out in FCC instructions long before Chameleon filed:

> An applicant for a new station must attest it has sufficient net liquid assets on hand, or committed sources of funds, to construct the proposed facility and operate for three months, without revenue.

Revision of Application for Construction Permit for Commercial Broadcast Station, 50 RR 2d 381, 388 (1981). Chameleon plainly had no "committed" source of funds; and there was certainly not so much as an "oral contract" to supply such funds, *even if* we applied the (relaxed) standard announced in the Commission's *Northampton* decision. *See* 4 FCC Rcd at 5519. We deny Chameleon's exceptions.

28. *First Coast.* Exceptions by Safe Care, Chameleon and Scopinich contend that the ALJ erred in resolving in First Coast's favor a financial issue by summary decision. It will be recalled, *see supra* para. 16, that First Coast's (nominal) chief steward, Edmund Bunker, asserted that his indication that the Commission's financial certification was "[n]ot applicable" was a "mistake," though never fully explained. When its application was nonetheless processed, a financial issue was added. By *Order*, FCC 89M-2275, released September 15, 1989, the ALJ accepted First Coast's August 29, 1989 financial amendment; and, over strong opposition, the ALJ subsequently granted summary decision in First Coast's favor on the designated financial issue. *Memorandum Opinion and Order*, FCC 89M-2608, released November 7, 1989.[33]

29. Putting aside for the nonce the threshold question of whether the ALJ should have accepted, after more than a *two - year* delay , First Coast's sorely belated "correction" without a very strong "good cause" showing, *see Radio Associates, Inc.*, 6 FCC Rcd 2094 (Rev. Bd. 1991), we are in complete accord with the exceptors that substantial and material facts remain as to whether this applicant was genuinely qualified when it filed its application.

30. First Coast maintains that it relied upon a May 1, 1987 letter from John N. Brown of Ocean State Bank, after Brown had a conversation with James B. Stockton, who is no longer associated with First Coast (*see supra* para. 15). However, none of the other three principals discussed the prospective loan with Ocean State, nor did they provide any critical financial information about the broadcast venture or themselves, notwithstanding that the letter called for their *personal* guarantees on any such loan. *See* Tr. 1047. In fact, Bunker, purportedly First Coast's sole active principal, evinced little if any knowledge about the entire matter; his only role with respect to First Coast's financing was -- to use Bunker's *own* description -- as a "pigeon" sent by Stockton to pick up the bank's letter.[34] Of course, by the time these facts were revealed (July 1990), the ALJ -- more than six months before -- had granted summary decision in favor of First Coast on the designated financial issue (*see supra* para. 28).[35]

31. The exceptors are again correct. The circumstances surrounding the May 1987 bank letter raise obvious and inevasible questions as to its core validity, and suggest very strongly a mere "accommodation" of Stockton by an acquaintance of his at the bank. *See Shawn Phalen*, 5 FCC Rcd 53 (Rev. Bd. 1990); *see also id.*, 5 FCC Rcd 4669 (Rev. Bd. 1990)(summary decision on financial issue rejected where applicant failed to show that loan letter was not empty "accommodation"). Because, based on Bunker's own vivid testimony (*see supra* note 34), it appears that nothing palpable may support Mr. Brown's 1987 letter, a full hearing is required to examine, if any, its substantive underpinnings. *See Christina Communications*, 2 FCC Rcd 1971, 1974 (1987); *Dutchess Communications Corp.*, 101 FCC 2d 243, 244-49 (Rev. Bd. 1985).

32. *LeeAnn Kendall Scopinich.* Safe Care and First Coast except to the ALJ's refusal to add a financial issue against Scopinich, in the face of First Coast's December 1989 motion to enlarge the issues against her. Both contend that the denial of First Coast's motion was error because, citing Scopinich's deposition testimony (and as was the case in *Shawn Phalen, supra*), Scopinich[36]:

> presented no business plan, no budget of construction or operation expenses, no documentation of her personal financial position, or any written information of any kind to the bank in conjunction with her loan request. Deposition Tr. 141. Apparently, the only written item she did present was a sample language for the letter.

Moreover[37]:

> The [bank] letter provides that the loan would be collateralized with Scopinich's liquid assets, along with land, buildings and equipment. However, Scopinich did not provide the bank with any documentation of her personal finances describing the extent of her liquid assets. She did not inform the bank whether she would purchase or lease land and buildings. Deposition Tr. 175-77. Neither did she provide the bank with an equipment proposal or other specific information concerning what equipment would be available to serve as collateral. Deposition Tr. 176.

And, further[38]:

> Scopinich certified to her financial qualifications on April 28, 1987--one day prior to the issuance of the above letter. She testified at deposition, however, that it was upon this letter that her certification was based. Deposition Tr. 66-67. She could not recall whether she received the letter in the mail or whether she had picked it up, but either way, she did not receive the letter prior to her certification.

Finally, Safe Care submits[39]:

> It is additionally evident that Ms. Scopinich did not engage in serious and reasonable efforts to ascertain the approximate costs of construction and operation prior to her certification. She admitted that she did not prepare a written budget but that she had merely spoken with a couple of engineers regarding certain construction expenses and had jotted them down on "scratch paper" long since discarded. Deposition Tr. 62-63. She further failed to consider programming costs (whether live or satellite); whether she would rent or purchase land and buildings for the transmitter and studio sites; how much land she would need for her transmitter site; whether she would build a guyed or self-supporting tower; and the size of her staff. Deposition Tr. 62, 89-90, 134-137.

33. Scopinich replies that her budget estimate was based upon discussions with broadcast engineers and her own prior broadcast employment; and that "to any extent that the [original] bank letter" created any undue inference that the bank was not seriously contemplating a loan[40]:

> its seriousness was confirmed when, upon engagement of new counsel, Ms. Scopinich procured a second and substantially similar letter from the same bank (Deposition, Exhibit 14), this time from the bank president rather than an assistant vice president [Swanson], spelling out the fact that the bank had made a preliminary review of Ms. Scopinich's loan request, including a review of her application and financial statements, and rephrasing the collateral requirement to require collateralization with the station's "tangible assets" in addition to Scopinich's "personal guarantee."

34. We have reviewed First Coast's Motion To Enlarge, filed December 14, 1989, Scopinich's Opposition, filed January 12, 1990, the relevant deposition testimony, and the ALJ's action. First Coast is correct. Initially, Scopinich clearly testified that no tangible construction budget was ever prepared prior to the filing of her application,[41] nor did she ever prepare a staffing plan or associated budget.[42] Furthermore, it seems evident from her own testimony that the original bank letter was issued by a bank employee who was virtually unknown to Scopinich,[43] and that she provided the employee nothing in writing prior to the issuance of the subject bank letter.[44]

35. Just as we concurred with the exceptors that a basic financial issue should have been tried against First Coast, and for many of the same reasons, the circumstances surrounding Scopinich's original certification of reasonable assurance of an adequate bank loan, particularly as

portrayed in her own deposition testimony (*see supra* notes 41-44), fully justified the addition of an issue. Not only is there a sharp doubt that Scopinich supplied the bank with the customarily requisite financial data about herself and her proposed broadcast venture, *see supra Shawn Phalen; Christina Communications,* it is equally questionable whether Scopinich herself had prepared a meaningful budget of her proposed construction and operating costs. If not, her sworn financial certification was, at best, dubious. *See Pepper Schultz,* 5 FCC Rcd 3273 (1990) (cost estimates must be factually based); *Northampton Media Associates, supra,* 4 FCC Rcd at 5519 ("applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs"). Based upon Scopinich's own deposition testimony, her certification appears, *prima facie,* infirm, and her later representations about this matter do not coincide with her deposition.

LACK OF CANDOR/MISREPRESENTATION

36. *LeeAnn Kendall Scopinich.* As previewed in prior sections, we have found serious fault with several aspects of Scopinich's application, but are especially troubled by the conduct surrounding her failure to report the acquisition of her ownership interest in the Sunset Grille, or the fact that she was working there full time in a management function, and the fact that her June 26, 1990 "Section 1.65 Amendment" seems quite possibly to be, all else considered, an attempt to deftly minimize the true and complete nature of her involvement. We must also address her testimony that she knowingly prepared a false jurat for submission to this federal agency.

37. It is noteworthy, we think, that when Scopinich filed her Integration Statement on February 6, 1990, advising of her employment with the St. Johns Chamber of Commerce and stating her intention to "terminate" that employment should she get this permit, she was but one month -- *to the day* -- away from her marriage and her joint restaurant ownership. *See* Tr. 1157-1158. Yet (1) her June 26, 1990 amendment did not fully disclose her *actual* connection to the Sunset Grille; and (2) not only did she fail to make a divestiture commitment, we are told straight-out that she had expressed no intention whatever to divest the restaurant. (In fact, she did not divest until June 1991, *see supra* note 28.) It seems unlikely (albeit not altogether impossible) that Scopinich did not know, on February 6, 1990, of her imminent change in status. And, it strikes us as curious, in that same vein, that she would file on February 6 a detailed description of her Chamber of Commerce duties, say *nothing* further until June 26, and then file an amendment that reported *only* her secretary-treasurership of Parrot Heads, Inc. While Scopinich disclaims having personally read the June 26, 1990 amendment *before* it was filed, she did see it soon after; still the full details were not elicited until cross-examination by First Coast counsel at the hearing itself. As illustrated by the recent *Richardson Broadcast Group, supra,* the Commission's demand for absolute candor is itself all but *absolute.* An issue shall be tried to take definitive evidence on the question of whether, from February 6, 1990 through July 26, 1990, Scopinich was thoroughly forthright on the matter of her restaurant ownership, and the reasons for her failure to fully and timely disclose the true nature of her connection with that ongoing business interest.

38. Most disturbing, however, is Scopinich's admission that, despite her sworn oath, she had *not* read the June 26, 1990 amendment that accompanied her contrary jurat. We need not rehearse at length either the Commission's overarching demand for complete candor or the general legal import of a sworn affidavit to convey the severity of Scopinich's misrepresentation. We need only reference the Commission's discussion in *Mary Ann Salvatoriello,* 6 FCC Rcd 4705 (1991), to inform the degree of urgency it attaches to sworn applicant signatures.[45] Indeed, as implicit in *Salvatoriello,* if the Commission cannot depend on the efficacy of a *sworn* signature at the very application stage, then the reliability of that applicant for complete candor as a licensee becomes exceedingly problematical.[46] We, therefore, add an issue to consider Scopinich's false jurat.

CONCLUSIONS

39. Pursuant to our discussion above, the following issues are added:

(1) to determine whether First Coast Radio, Inc. had reasonable assurance of a loan letter from the Ocean State Bank when it filed its application and whether it is basically financially qualified to be a licensee;

(2) to determine whether LeeAnn Kendall Scopinich had reasonable assurance of a loan from the Florida National Bank when she filed her application and whether she is basically financially qualified to be a licensee;

(3) to determine whether LeeAnn Kendall Scopinich was lacking in candor or made intentional misrepresentations with respect to her ownership interest and employment in the Sunset Grille restaurant and the effect thereon that applicant's basic qualifications to be a Commission licensee; and

(4) to determine whether LeeAnn Kendall Scopinich had made misrepresentations or has been lacking in candor with respect to the declaration signed under penalty of perjury appended to her amendment dated June 26, 1990, and the effect on her basic qualifications to be a licensee.

40. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for a further hearing on the issues specified herein, and for the preparation for a Supplemental Initial Decision.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Another applicant, Tallahassee Broadcasting Co., did not file exceptions to the *I.D.*, and has therefore failed to prosecute. Its application will receive no further consideration. 47 CFR § 1.276(f).

[2] *See* 47 CFR § 1.276(c)(2) (supplemental briefs).

[3] While our prior *MO&O* indicated that we would specifically address the numerous exceptions in our final *Decision*, we have decided to treat them in this interlocutory opinion so as to better explain the unique posture of this case.

[4] Tallahassee Broadcasting Co. (dismissed, *supra note* 1) was charged with controlling interest in 12 other radio stations, several located in Florida. *I.D.*, para. 117.

[5] Emision Exceptions at 3-4.

[6] *But cf. supra Reexamination of the Policy Statement; Bechtel v. FCC* .

[7] Because we affirm the *I.D.*'s financial disqualification of Chameleon, *see infra* paras. 24-26, we need not, and do not, consider its integration proposal.

[8] The *I.D.* (at para. 19) states:

> The change in the Hintons' corporate status was made, according to Cheryl Cox, at the suggestion of Safe Care's communications counsel based upon the fact that the Hintons did not want to be integrated into the running of the station (Tr. 138-139).

There is no record discussion of consideration for the stock transfer (so far as we are aware).

[9] *Review denied*, 2 FCC Rcd 1259 (1987), *aff'd per judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988)(table).

[10] The exceptors also maintained that the amended Safe Care ownership structure is a sham in that:

> [i]t is also argued that the non-voting stockholder Robert Hinton has actively participated in decision making and that coupled with his financial backing indicates that he has *de facto* control of the applicant Safe Care.

I.D. at para. 112. The ALJ rebuffed this argument. Because we reject Safe Care's integration credit on other grounds, we need not determine whether the (amended) Safe Care structure is but a tarradiddle in the manner of, *e.g.*, *Royce Int'l Broadcasting*, 5 FCC Rcd 7063 (1990) (brother uses sister as false front to skew comparative profile), *recon . denied*, 6 FCC Rcd 2601 (1991).

[11] *Cf. Doylan Forney*, 5 FCC Rcd 5423, 5427-28 (1990) (warrant holder shown to be "not likely to exercise the warrants it holds"; passive ownership status accepted)(citing *Signal Ministries)*.

[12] Willie James Martin, a 20% equity holder -- and also its reported president, secretary, and sole voting shareholder, *I.D.*, para. 59 -- proposed to be the general manager of this Ponte Vedra Beach facility. *Id.*, para. 61.

[13] Dale Broadcasting's Exceptions (at 3) recite Martin's divestiture pledge as follows:

> Willie James Martin will divest himself of any and all interests in any attributable media in the event of a grant of this [Ponte Vedra Beach] application. *This commitment includes all interests acquired after this application is filed. Further, Mr. Martin will sever all connections with WORL and any other broadcast station employment upon a grant of program test authority for the proposed station.*

The ALJ had reported:

> Mr. Martin holds the following media interests: Mr. Martin is a 50.5% voting stockholder of SE Broadcasting licensee of WBZS(AM), Eatonville, Florida. An application for transfer of control of SE Broadcasting was filed on July 11, 1990. If this application is approved, Mr. Martin will transfer his interest in SE Broadcasting to the proposed transferee (Tr. 571-73). Mr. Martin is President, Treasurer, a director and 50% shareholder of Tallahassee Radio, Inc., permittee of WTWF(AM), Woodville, Florida. Mr. Martin is licensee of WBZR(AM), Destin, Florida. Mr. Martin is Secretary, Treasurer, director and 49% owner of Nitrameel, Inc., which was the proposed assignee of WMLO(FM), Havana, Florida (FCC File No. BALH-891219GT)(Dale Exh. 2A, p. 4). This assignment of licensee was approved by the Federal Communications Commission, but the assignment will not be consummated (Tr. 573-74).
>
> * * *
>
> Additionally, Mr. Martin was sole proprietor of an applicant for new AM station at Ensley, Florida (FCC File No. BP-870722AG). When the application was designated for hearing, Mr. Martin chose not to pursue it (Tr. 575). Mr. Martin is a nonvoting shareholder (10% equity) of Evett Communications, Inc., applicant for a new FM station at Port St. Lucie, Florida (FCC File No. BPH-891018MN) (Dale Exh. 2A, p. 4).

I.D. at paras. 80-81.

[14] *See I.D.* at para. 62. For example, though Martin claimed to be a resident of Jacksonville (16 air miles from Ponte Vedra Beach), (1) he and his wife maintain their domicile in Albany, Georgia where, since October 1989, he manages an Albany radio station and his wife works full time at a local bank, *I.D.*, para. 65; (2) the Jacksonville-address driver's license tendered by Dale as evidence had expired and never been renewed, *id.*, para. 64; (3) in a December 1989 FCC assignment application, Martin reported an Orlando address as his personal residence, *id.*, para. 66; and (4) Martin's claim to Jacksonville voter registration (and voter participation) was flatly belied by Jacksonville election authorities. *Id.*, para. 67.

[15] Dale Exceptions at 13.

[16] *See, e.g., id.*, at 9, 14.

[17] *Id.*, at 5.

[18] *Id.*, at 3.

[19] *Id.*

[20] *Id.*

[21] Because we affirm the *I.D.* in its refusal to award integration credit to Dale for the reasons set out, and as with Safe Care, *see supra* note 10, we need not delve into the validity of its two-tiered ownership structure, though the facts in this case could easily be read to suggest that William E. Summers, Dale's 80% equity owner and putative financier, is (and would have been) more than a "passive" owner. *See I.D.*, paras. 60-61. Nor need we delve into the validity of Dale's financial certification, *see id.*, para. 60 (no solid funding agreement between Martin and Summers).

[22] As discussed *infra*, paras. 28-31, where we also add a financial issue against First Coast, Bunker appears to have had no sound basis upon which to even *address* its financial resources, one way or another. This might, but only *might*, explain his "mistaken" response to Section III.

[23] Perfect examples of the invalidity and insincerity of First Coast's entire Model EEO Program are found at Tr. 1056-1062. Therein Bunker testified that, although its program listed the Jacksonville NAACP as an employment source, no First Coast principal ever contemplated, let alone contacted, this organization. Tr. 1056. The same was true of the League of Women Voters and the Florida State Employment Service. *Id.* It was only several years *after* the application was filed that Bunker claims to have looked into some of the listed EEO sources, *e.g.*, :

> Q. [Counsel] Now, do you know where the NAACP Jacksonville chapter has its office?

A. [Bunker] Yes, Sautel Street, which is in the northwest section.

Q. And when did you acquire that information?

A. After this application.

Q. After your deposition in fact?

A. Pardon me, after the deposition, correct.

Q. At the time of your deposition, you didn't know where it was, did you?

A. No.

Q. And your deposition was -- MR. MONAHAN: December 6.

BY MR. FRIEDMAN.

Q. December 6, 1989?

A. Correct.

Q. More than two years after you filled out this application, correct?

A. Right.

Q. And what was the reason that you inquired as to where the NAACP was?

A. Well, we had been applying for this station forever, and my feeling was it was going to be forever, so I thought [I had] plenty of time for everything. I guess I was wrong. But I realized that someday, somewhere it is going to happen, so I went around -- frankly, I wanted to find out, we have very few employees, but I don't want to wander that way, but I wanted to find out where all these things were, so in case we did, we were successful, I would know where we did, we were successful, I would know where to turn to get help on minority status.

Q. Did anybody suggest to you that it might be a good idea for you to find out where the NACCP was since you didn't know at your deposition in case it might come up at this hearing?

A. I advised myself, after reading my deposition.

Q. And did you also learn after your deposition who the officials of the Jacksonville chapter are?

A. Yes, the President, Ms. Daniels, yes, indeed.

Q. And have you ever spoken with Mr. [sic] Daniels?

A. Tried to get her by phone but got a recording suggesting I join, dues $10 a year, that's the only thing I heard.

Q. Did you join?

A. Not yet.

Q. And did you ever write a letter to Mr. [sic] Daniels?

A. No. Mrs. [sic] Daniels.

[24] The pertinent portion of the hearing transcript there reads:

Q. [Counsel] Do you have 100 percent ownership of the grill?

A. [Scopinich] No.

Q. You own that with your husband perchance?

A. Yes.

Q. It notes here [§ 1.65 amendment] that you are the secretary-treasurer of the company that owns the grill, is that correct?

A. Yes.

Q. Do you own stock in that company too?

A. Yes.

Q. How much?

A. I think it's 38 percent.

Q. Your husband owns the rest?

A. No.

Q. A group of people own it?

A. Yes.

Q. Do you work there now full time at the grill?

A. Yes.

Q. In what position?

A. I manage the wait staff and I handle all the advertising.

Q. How big a staff is it?

A. Twenty people.

Q. Is this a new business?

A. Uh-huh, yes.

Q. A start-up restaurant?

A. It was a former restaurant, it's new under our ownership.

Q. How long have you been involved with the restaurant?

A. Since the first week in March of 1990.

[25] The amendment reported only that Scopinich had become secretary-treasurer of Parrot Heads, Inc., which in turn operated the Sunset Grille. *See* "Section 1.65 Amendment," filed June 26, 1990.

[26] The pertinent portion of the transcript there reads:

Q. [Counsel] Have you reviewed this document? I am pointing to the document that has the caption of this proceeding, entitled "Section 1.65 Amendment?"

A. [Scopinich] Yes. This is erroneous.

Q. When did you review this document?

A. When was it filed?

Q. Well, it has a date on it.

A. Oh, I signed it June 18th.

Q. Did you read this document before you signed it?

A. No.

Q. You didn't. Had you seen this document before you signed it?

A. No.

Q. What did you do, just sign the affidavit here in blank?

A. Yes.

Q. And then send it back to --

A. That's correct.

Q. And had you informed [counsel] of the location of the new business you now operate?

A. I thought I had.

Q. Do you recall when you informed her of that?

A. Once I received that in the mail, I then said there is a mistake, it was St. Augustine Beach, not Ponte Vedra Beach, so she said correct it when you are on the stand.

Q. Had this already been filed with the FCC, to the best of your knowledge?

A. Yes.

Q. You received a copy of the document which had been filed?

A. That is correct.

[27] First Coast Exceptions at 15-16.

[28] Scopinich Repy at 5-6. That pleading also states that by amendment of June 3, 1991 -- or approximately one year *after* her quoted testimony -- she sold her interest in the Sunset Grille. *Id.*, at n. 5.

[29] The June 1991 sale of her restaurant interest cannot upgrade Scopinich's comparative standing, for that is *post hoc* and purely fortuitous; not even she argues otherwise.

[30] We do not accept counsel's oral argument suggestion that Scopinich's initial Integration Statement pledge to leave her "employment" at the St. Johns County Chamber of Commerce also covered her later-acquired restaurant *ownership* interest, and her management thereof. As exemplified in *Woods Communications Group, Inc.*, 7 FCC Rcd 78, 79-81 (1991), the Commission demands that a pledge to devote full time to station management must likewise include a specific, unambiguous pledge of total resignation from *current* full-time employment. There, despite an applicant principal's unequivocal deposition testimony that she would leave her (present) teaching position for full time station management, and her fully congruent hearing testimony, the Commission refused to credit the pledge because of its view that the record did not contain an adequate resignation pledge. There also, the failure of counsel to explain why a more specific resignation pledge was not placed on "the record" was not considered a mitigation. *See id.*, at 81.

[31] Chameleon Exceptions at 3.

[32] In fact, for lack of an adequate explanation, the court did not affirm the departure from pre-*Northampton* precedent. *See* 941 F.2d at 1216. *Et sic pendet.*

[33] With its amendment, First Coast asserted merely that Bunker's "mistake" in the financial certification was "simply overlooked. " First Coast Reply at 3.

[34] At Tr. 1046-48 (emphasis added), we find Bunker's testimony:

BY MR. FRIEDMAN:

Q. I'm showing you a letter dated May 1, 1987, from John N. Brown, Executive Vice President of the Ocean State Bank, and it's addressed to First State Radio, Inc., and there is no address, and the salutation is "Gentlemen," and I ask you if you have ever seen that letter?

(The document was proffered to the witness.)

A. [Bunker] Yes, I am quite familiar with it.

Q. Okay. Now, it doesn't bear any address. Was this letter sent to -- was this letter hand delivered to First Coast Radio?

A. I picked this letter up after a phone conversation of Mr. Stockton and the Executive Vice President, I think he was then, yes. And he said what he wanted and he had done a lot of business with him, and he said he would write the letter and I went over and picked it up.

Q. And it bears the date of May 1, 1987, is that the date that you picked it up?

A. As I recall -- that has been quite a while, but that makes sense that it would be.

Q. Was it on or about May 1st?

A. It was on or about May 1st, yes, indeed.

Q. Okay. Now, was it Mr. Stockton who had the conversation with Mr. Brown that resulted in obtaining this letter?

A. That's correct.

Q. *Okay, and you were more or less the messenger* ?

A. *The pigeon.*

Q. The pigeon. And did you provide any financial information about yourself to the Ocean State Bank?

A. At that time, it wasn't necessary. He accepted the fact that Mr. Stockton, due to his knowledge Mr. Stockton had a balance sheet there, and he accepted that, particularly since, as you notice, it was we jointly and severally agreed to pay and he accepted Stockton's balance sheet to take care of it, in any event.

Q. *And have you ever provided any financial information to the Ocean State Bank*?

A. *Never been asked.*

Q. *Do you have an account there*?

A. *No I don't.*

Q. *And do you know whether Mr. McCormick or Mr. Shaker has supplied any financial information to the Ocean State Bank*?

A. *None of us have, as far as I know.*

Q. *Okay. And have you -- do you know whether you or any of the other shareholders have supplied a personal guarantee* ?

A. *Not to that Bank, no.*

Q. To any bank?

A. No, we stood ready to supply that guarantee to that bank, but we didn't.

[35] As Scopinich's Exceptions also observe, the summary decision precluded discovery on the designated financial issue; in fact, First Coast's opponents complained, at the time, that discovery had not even commenced. *See id.*, at 6-7.

[36] Safe Care Exceptions at 8.

[37] *Id.*

[38] *Id.*, at 8-9.

[39] *Id.*, at 9.

[40] Scopinich Reply at 4.

[41] At Scopinich Deposition, 62 (emphasis added), she replied as follows:

Q. [Counsel] Now, also in connection with the preparation of your application, did you ever make up a budget of what it was going to cost to construct the station?

A. [Scopinich] Yes.

Q. Okay. Does a budget exist?

A. No.

Q. What did you do with it?

A. It was just in conversations with the engineer to find out --*I threw it away. It was just scratch.*

[42] *Id.*, 133-134, where she replied:

Q. Did you develop a staffing proposal for your station?

A. Not formal, no.

Q. Absent a formal one, what did you do which was not formal in the way of developing a staffing proposal?

A. Based on my sales experience, I know what I need and want in terms of sales and I will have an on-staff engineer and a news person.

Q. Did you tally up the number of full-time people formats?

A. No.

[43] *See id.*, at 173-174.

[44] *See e.g., id.*, at 141 (emphasis added), where she replied:

Q. He [Swanson] issued the bank letter to you based on your oral request?

A. Yes.

Q. And you outlined for him briefly what you had in mind?

A. Yes.

Q. *Did you have the scrap of paper with you*?

A. *What scrap of paper*?

Q. You mentioned you had scratched out some figures on a budget but you had thrown it away.

A. I just -- we were just talking.

Q. Who is 'we'?

A. Jim Swanson and I.

No, *I didn't show him anything written down. I said this is --it was all verbal.*

[45] Especially, *see* 6 FCC Rcd at 4709 nn. 16, 17. *See generally also SBM Communications, Inc.*, FCC 92-229, released June 3, 1992 at paras. 8-11 (lack of *original* signature is fatal).

[46] *But cf. Broadcast Associates of Colorado*, 104 FCC 2d 16, 19 (1986)(premature certification of engineering portion of application not disqualifying).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier Association, Inc. — AAD 92-19

Petition for Waiver of Sections 36.611(a) and 36.613(a) of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 1992; Released: June 9, 1992

By the Deputy Chief (Operations), Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In this Order we consider a petition filed by the National Exchange Carrier Association, inc. (NECA) on January 31, 1992, requesting that the date required for Local Exchange Carriers (LECs) to submit Universal Service Fund (USF) data to NECA be temporarily moved from June 30 to August 31, and the date required for NECA to submit these data to the Commission be moved from September 1 to November 1.[1] We are granting this petition in part, as discussed herein.

2. The Commission established the USF in 1986, based on a Federal-State Joint Board recommendation. The fund allows study areas with high loop costs to recover additional revenues from the interstate jurisdiction to offset intrastate costs. The goal of the fund is to preserve universal service by enabling high cost companies to establish local exchange rates that do not substantially exceed rates charged by other companies.

3. Section 36.611(a) of the Commission's Rules requires that the LECs file specific unseparated investment, expense and loop count data with NECA on June 30 of each year in order to determine eligibility for USF expense adjustment. These calculations are based on data through December 31 of the previous year. Section 36.613(a) of the Commission's Rules requires that NECA file unseparated loop cost data, a nationwide average unseparated loop cost, the amount of high cost expense adjustment for each study area, and the total nationwide amount of the expense adjustment with the Commission on September 1 of each year. Section 36.613(a) also requires that NECA file loop cost data, the dollar amount of USF expense adjustment and the percentage of change for each study area for the previous five years.

4. Section 61.58(d)(2) of the Commission's Rules requires that tariff filings involving a change in rate structure or a rate increase must be made on at least 45 days' notice. Therefore, NECA files the new USF tariff rate, to be effective January 1, on approximately November 15 of each year. Section 1.773(a)(2)(ii) provides that petitions seeking suspension or rejection of a new tariff filing made on at least 45 days' notice will be filed and served within 15 days after the date of the tariff filing. As a result, interested parties have until approximately December 1 of each year to file their comments, effectively giving them from September 1 to December 1 to review and analyze NECA's USF filing.

II. PLEADINGS

5. In its petition, NECA states that many LECs are unable to complete separations categorization cost studies by the June 30 reporting date, so they submit estimated separations studies, or separations studies representing a prior period. According to NECA, the data used in the USF process are updated later, when the applicable separations studies become available. This situation results in many adjustments to USF data after the June 30 reporting date and, frequently, after the September 1 filing with the Commission. NECA claims that the LECs must gather data twice, once for USF purposes and a second time for input to their cost separations studies.

6. NECA requests that we add two months to the LECs' filing schedule to enable them to synchronize cost separations studies and USF data collection efforts, thus eliminating unnecessary steps and reducing the number of post-June 30 USF adjustments. NECA claims that, according to its survey of 1991 filings, more than 100 additional 1990 cost separation studies would have been completed and available for use in preparing the 1991 USF data submission had the LEC reporting date been August 31, 1991. NECA estimates that the current reporting schedule resulted in the LECs expending more than 200 hours to make more than 900 adjustments to their USF data. NECA admits that changing the filing date to August 31 will not guarantee that all cost studies will always be completed, but submits that significant savings will result, and fewer corrections for new or revised data will be necessary.

7. NECA also requests that we add two months to its filing deadline for filing USF data with the Commission, to correspond to the addition of two months to the deadline for the LECs' filings with NECA. NECA claims that it needs two months to perform an extensive set of edit and range analyses, and to conduct a review for conformance with FCC rules. NECA's filing deadline would then be November 1 instead of September 1.

8. NECA suggests that we grant this waiver temporarily, for two years, in order to give the Commission and all participating parties time to evaluate the benefits of this proposal. NECA states that two years, rather than one, would ensure that enough time is given to ascertain that the administrative burden on the LECs is reduced, and that reporting accuracy is increased. NECA states that if its suggested changes in filing deadlines are successful, it will initiate a Rule Making to change the filing dates permanently.

9. Ten parties filed comments, with nine parties in complete support of NECA's request.[2] These nine parties reiterate NECA's contention that allowing an additional two months for the submission of USF data will synchronize cost separations studies and USF data collection, thus reducing the number of adjustments and eliminating duplicative data gathering. NTCA also states that given industry and Commission experience with the annual USF process, NECA's request represents a reasonable balance

between the time needed for the public and the Commission to review these data and the time needed for the industry to prepare them in a cost effective manner.

10. AT&T does not oppose the requested waiver, provided that a corresponding two month extension of time be granted for interested parties to review the data and file comments. AT&T states that under NECA's proposal, NECA and the LECs are given a two month extension for preparing and filing the USF data, but interested parties and the Commission are given only one month to review and comment on the data (a two month cut in the time currently allotted for these activities). AT&T asserts that one month is insufficient to conduct any type of meaningful review because the data are voluminous and complex. AT&T recommends that approval of NECA's waiver request be accompanied by a two month extension of the review period and the effective date of new USF rates. AT&T would adjust for the delay by keeping the existing rates in effect for two extra months. Then, when the new rates are approved, an adjustment for the remainder of the year would be made as a "true-up" mechanism, if necessary.

11. All parties filing reply comments were in support of NECA's petition.[3] In its reply, NECA opposes AT&T's suggestion that petitions to reject or suspend proposed USF rates be delayed until February 1 with new USF rates becoming effective on March 1. NECA states that this timetable would result in a mismatch between the effective date of the USF tariff and the USF revenue requirements. NECA further states the the "true-up" proposed by AT&T would result in a permanent mismatch rather than a one-time transition and would also add unnecessary complexity to the USF settlement process.

III. DISCUSSION

12. We believe that NECA presents credible evidence that a longer preparation period could result in better and more accurate filings and we grant its petition in part. However, NECA's proposal, as set out in its petition, is unacceptable because it reduces the time available for Commission and interested party review of the USF filings below the minimum necessary for effective review and analysis. Currently parties have approximately 90 days to review this data, from September 1 to December 1.[4] Under NECA's proposal, the review period would be cut to 30 days. As AT&T stated, this is clearly inadequate, considering the volume and complexity of the data.

13. We accordingly determine that the due date for LECs to file USF data with NECA should be moved from June 30 to July 31, and the due date for NECA to file USF data with the Commission should be moved from September 1 to October 1. We believe that the review times remaining should be adequate for Commission staff and interested parties, and that this compromise resolution offers some of the benefits of NECA's proposal without imposing the unrealistic reviewing deadlines that that proposal would have created. This changed filing schedule is therefore implemented, as NECA requested, for a two-year trial period, 1992 and 1993, after which NECA and other interested parties may seek to make this modification permanent.

IV. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C § 154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that the National Exchange Carrier Association's Petition for Waiver of Sections 36.611(a) and 36.613(a) of the Commission's Rules IS GRANTED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

FOOTNOTES

[1] NECA's Petition requests this waiver for the years 1992 and 1993 only. If the USF process is improved by the changed filing dates, NECA would then file a petition to amend the rules permanently.

[2] The commenting parties are: Alltel Service Corporation; American Telephone and Telegraph Company (AT&T); Frederick & Warinner; Fred Williamson & Associates, Inc.; GVNW Inc./Management; John Staurulakis, Inc.; National Telephone Cooperative Association (NTCA); Southwestern Bell Telephone Company; Telephone Utilities Exchange Carrier Association; and the United States Telephone Association (USTA).

[3] Reply Comments were filed by: Adams Telephone Co-Operative: Arctic Slope Telephone Association Cooperative; Baca Valley Telephone; Canby Telephone Association; Custer Telephone Cooperative, Inc.; Fairbanks Municipal Utilities System; Farmers Mutual Telephone Company, Ltd., Kingdom Telephone Company; Leaf River Telephone Company; Molalla Telephone Company; NECA; NTCA; Range Telephone Cooperative; Roggen Telephone Cooperative Company; Roosevelt County Rural Telephone Cooperative, Inc.; Scio Mutual Telephone Association; Stayton Cooperative Telephone Company; Triangle Telephone Cooperative Association, Inc.; Uintah Basin Telephone Association, Inc.; and USTA.

[4] The data is made public when it is filed with the Commission on September 1. Interested parties have until December 1 to file objections to the tariffs which are based, in part, on the NECA USF data.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 8, 1992

TELEPHONE CALLING CARDS

This informational material has been prepared to answer a number of the questions the Federal Communications Commission (FCC) commonly receives about telephone calling cards.

WHAT ARE TELEPHONE CALLING CARDS?

Calling cards are specialized credit cards issued by local and long distance telephone companies. The cards generally allow you to make telephone calls while away from your home or office and to charge those calls to your home or office telephone account.

CAN I USE MY CALLING CARD TO MAKE LONG DISTANCE CALLS WITH ANY TELEPHONE COMPANY

Most cards issued by long distance companies may be used only for long distance calls carried on the network of that company. If your card was issued by a local telephone company, it will probably be valid to obtain service from any long distance company. Remember, however, that the rates you will be charged are set by the long distance telephone company that handles your call. That company is not necessarily the company that issued the card.

HOW DO I KNOW WHAT COMPANY WILL BILL ME WHEN I USE MY CARD?

If you begin a long distance call by dialing "0", you probably will be connected automatically to the long distance telephone company presubscribed to that telephone. That presubscribed company will bill you according to its rates when you use your calling card. The FCC requires that the company transmitting the call from a public location identify itself before any charges are incurred. It is important to listen to who that company is to ensure that you are using your company of choice and will be charged the rates of your preferred telephone company. The FCC requires that the identity of the presubscribed company also appear on or near telephones available for public use, such as pay telephones and hotel or motel telephones.

WHAT DIFFERENT TYPES OF CALLING CARDS ARE AVAILABLE?

There are two frequently used types of calling cards. Line number-based cards use your 10 digit telephone number, generally followed by a personal identification number (PIN). Other cards use a 14 digit calling card number that is not associated with your telephone number.

MAY I GET A CALLING CARD WITH MY TELEPHONE NUMBER ON IT?

In some cases. You should check with your local and long distance telephone companies to find out their specific policies. Most calling cards issued by local telephone companies use your telephone number. They may also allow you to elect to have your PIN left off the card. Some long distance companies will also issue a line number-based card.

DOES THE FEDERAL GOVERNMENT DECIDE WHICH TYPE OF CARD A LONG DISTANCE TELEPHONE COMPANY ISSUES?

No. That decision rests solely with the long distance telephone company that issues the card.

MAY I GET CALLING CARDS FROM MORE THAN ONE TELEPHONE COMPANY?

Yes. You may get a calling card from each of the telephone companies with which you want to do business. In some cases, you may get each of these different cards with your telephone number on it but with different PINs.

IF I GET A NEW CARD FROM MY LONG DISTANCE COMPANY, DO I HAVE TO GIVE UP MY OLD LINE NUMBER-BASED CARD?

The number on the old card may still be good, but you need to check with your local telephone company to be sure. Generally, if the logo on your line number-based card is that of your local telephone company, the card is still good, and you do not have to take further action.

WHAT SHOULD I DO IF THE TELEPHONE COMPANY WILL NOT COMPLETE MY CALL BECAUSE I AM NOT USING A LINE NUMBER-BASED CARD?

If you desire to use the telephone company that issued your card, follow the instructions on the card for obtaining access to its network. The FCC requires most long distance telephone companies to have a toll free "800 number" or a local telephone number beginning with "950" for consumers to reach them. If you desire to use the company that you have already reached, however, you may use a line number-based card issued by a local telephone company (if you have one), arrange for the call to be billed collect or use any other billing procedure that the company offers.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 4120
Tariff F.C.C. Nos. 1 and 13

ORDER

Adopted: June 2, 1992; Released: June 2, 1992

By the Chief, Common Carrier Bureau:

1. On May 20, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective June 3, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing modifies AT&T's Long Distance Message Telecommunications Service Promotion in which AT&T customers are offered an item of non-telecommunications merchandise or a check if they select AT&T as their primary interexchange carrier to include vendor coupons.

2. On May 27, 1992, MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Transmittal No. 4120.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4120 and MCI's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. Nos. 1 and 13, Transmittal No. 4120, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, FCC 92-181 (released Apr. 17, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

URBAN TELECOMMUNICATIONS CORP. (Assignor) File No. BAPCT-890418KF

and

URBAN BROADCASTING CORPORATION (Assignee)

For *Pro Forma* Assignment of the Construction Permit for Unbuilt Television Station WTMW, Channel 14, Arlington, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1992; Released: June 16, 1992

By the Commission:

1. The Commission has before it for consideration: (a) the February 2, 1990, action of the staff granting the above-captioned *pro forma* application to assign the construction permit of unbuilt television station WTMW, Arlington, Virginia, from Urban Telecommunications Corp. ("Urban") to Urban Broadcasting Corporation ("UBC"), and denying the informal objection filed by WSCT-TV, Inc. ("WSCT-TV"), *Letter to Michael H. Rosenbloom, Esq.* (Video Services released February 2, 1990); (b) an application for review filed by WSCT-TV; (c) an opposition filed by Urban; and (d) a reply filed by WSCT-TV.

BACKGROUND

2. Urban, WSCT-TV and others were competing applicants for UHF Channel 14. Following extensively litigated comparative proceedings that included administrative and judicial review, the Commission issued the Channel 14 construction permit to Urban, which proposed building the station in Arlington, Virginia. *Washington's Christian Television Outreach, Inc.*, 94 FCC 2d 1369 (ALJ Initial Decision 1983), *remanded*, 94 FCC 2d 1360 (Rev. Bd. 1983), *on remand*, 99 FCC 2d 428 (ALJ Supplemental Initial Decision 1984), *aff'd*, 99 FCC 2d 395 (Rev. Bd. 1984), *rev. denied*, 59 RR 2d 787 (1985), *recon. denied*, 59 RR 2d 1679 (1986), *aff'd per curiam, Washington's Christian Television Outreach, Inc. v. F.C.C.*, No. 85-1649 (D.C. Cir. 1987). Urban, a Virginia corporation, was controlled by its President and sole shareholder, Theodore White ("White"), a minority. On April 18, 1989, Urban filed the subject "short-form" application (FCC Form 316) to assign the Channel 14 construction permit to UBC, a newly formed Delaware corporation also controlled by White. White is President of UBC and, of the total 14,500 shares authorized, White holds all of the 5,500 shares of UBC's Class A, voting common stock. UBC will also issue 4,500 shares of Class B, Series 1, nonvoting common stock to HSN Broadcasting of Virginia, Inc. ("HSN Virginia") (formerly Silver King Broadcasting of Virginia, Inc.) for $10.00 per share ($45,000). Additionally, UBC will retain all 4,500 shares of its Class B, Series 2, voting common stock. HSN Virginia will have the option to convert, share for share, the Class B, nonvoting stock to the Class B, voting stock. However, HSN Virginia has agreed that it will not exercise its option to convert the nonvoting stock to voting stock until eighteen months have elapsed from the time the television station begins operation pursuant to Program Test Authority. Thus, White will still control 100 percent of the permittee's voting stock. In addition, if and when HSN Virginia exercises its option to convert, White will still hold 55 percent of UBC's outstanding voting stock.[1]

3. Ancillary to HSN Virginia's equity involvement in the structuring of UBC, HSN Virginia's parent, HSN Communications, Inc. ("HSN Communications") (formerly HSN Silver King Broadcasting Company, Inc.), will lend UBC $4.5 million.[2] Under this part of the proposal, following the formation of UBC and the approval of the assignment application by the Commission, UBC will pay to Urban $1.15 million of the funds loaned "to cover the past, current, and future expenses incurred by [Urban] in obtaining the Channel 14 construction permit and in attempting to construct and finance the facility.[3] In addition, within five days of commencement of broadcasting operations, UBC will pay $350,000 directly to White, and UBC will employ White as General Manager of the television station under a five-year contract at an annual salary of $150,000. Finally, UBC will become a programming affiliate of the Home Shopping Club.[4]

4. WSCT-TV filed an informal objection opposing the proposed assignment. First, WSCT-TV charged that the assignment application was procedurally defective in that

[1] We note that should HSN Virginia exercise its option to convert its nonvoting stock to voting stock, White's 55 percent voting interest would make him a single-majority shareholder. Thus, HSN Virginia's 45 percent interest would not be cognizable under our attribution policy. *See* 47 C.F.R. §73.3555, Note 2(b).

[2] Urban and HSN Communications executed a Letter of Intent, dated January 10, 1989, setting forth the nature of the proposed transaction. HSN Communications is a wholly owned subsidiary of Home Shopping Network, Inc.

[3] Letter of Intent at ¶5.

[4] Following grant of the application, UBC filed an ownership report (FCC Form 323) along with those contracts required to be filed by Section 73.3613 of the Commission's Rules. We note that those executed instruments filed after consummation carry forth the obligations set out in the Letter of Intent and the instruments previously filed, except that HSN Communications will now lend UBC up to $5.45 million to be used by UBC to finance and operate the station and to pay the $1.15 million to Urban and the $350,000 to White. We also note that, while both White and HSN Virginia have pledged their respective stock holdings as security for the HSN Communications loan, White retains fully his ownership and voting rights. UBC also filed its executed affiliation agreement with the Home Shopping Club, a seven-year agreement which calls for compensation to UBC in the amount of $246.00 per hour broadcast.

Urban had failed to submit the appropriate basic contractual undertakings contemplated by the assignment because the application included only the unexecuted Letter of Intent. Second, WSCT-TV averred that Urban had abandoned its commitment made during the comparative proceeding to build a minority-owned, operated and controlled station that will devote significant amounts of programming to issues confronting the minority community. Third, WSCT-TV claimed that Urban has not followed through with its original financing plans, raising questions concerning Urban's financial qualifications. Finally, WSCT-TV alleged that Urban and White would profit from the transaction in a manner inconsistent with the "no-profit" provision of Section 73.3597 of the Commission's Rules. *See* 47 C.F.R. Section 73.3597(c).

5. By letter dated February 2, 1990, the Chief, Video Services Division, denied WSCT-TV's informal objection and granted Urban's *pro forma* assignment application. Initially, the staff found that the various executed agreements submitted set forth the entire scope of a binding understanding between the parties.[5] Based on the agreements, the staff concluded that the assignee will have full control over the station and its assets after consummation. The staff also found that, since White will remain in control of the permittee because he will hold all of UBC's voting stock, the use of FCC Form 316 was appropriate. The staff also concluded that the station will remain minority controlled, even in view of its affiliation with the Home Shopping Club. Regarding the financial qualifications of Urban, the staff determined that the record fully demonstrated that Urban was financially qualified when it was granted the construction permit for WTMW and that Urban remains financially qualified because it would be receiving financial assistance from HSN Communications. The staff concluded that "the substitution of [HSN Communications as the source of funds], whose financial resources were unchallenged, will permit [Urban] to carry out its commitments to construct and operate WTMW." Lastly, with respect to the alleged violation of the no-profit provision of Section 73.3597, the staff determined that subsection 73.3597(a)(3) of the Commission's Rules "specifically provides that the general provisions of the rule are inapplicable to *pro forma* applications." In addition, the staff found, citing *Radio Station WABZ, Inc.*, 51 RR 2d 37 (1982)("*Radio WABZ*"), [6] that the informal objection did not establish a violation of any Commission policy in this area. The staff concluded that WSCT-TV had failed to establish a *prima facie* case demonstrating that grant of the application would be inconsistent with the public interest. Even if WSCT-TV had made a *prima facie* case, the staff found that the amended application, the informal objection, and the responsive pleadings failed to raise any substantial questions of fact to warrant further inquiry. Subsequently, WSCT-TV filed its application for review.

SUMMARY OF THE PLEADINGS

6. In its application for review, WSCT-TV contends that the staff has given its consent to a violation of the letter and spirit of the policies underlying the Commission's comparative hearing process and the "no-profit" rule. [7] WSCT-TV argues that, by virtue of the proposed assignment, Urban has abandoned its express promises made in the comparative hearing with respect to the minority orientation and control of WTMW as well as Urban's financial proposals. Specifically, WSCT-TV claims that Urban's comparative case was predicated on its ability to construct a minority-owned and minority-oriented television station utilizing bank loans and equipment financing. Therefore, WSCT-TV urges that if the Commission had been aware of the potential interest of the Home Shopping Network organization, there would have been an evidentiary examination and decision as to whether Urban was entitled to a minority preference in light of this interest. WSCT-TV also maintains that Urban's financial qualifications warrant further consideration due to its changed plan of financing. According to WSCT-TV, Urban's financing proposal had included a bank and an equipment lender which have dropped from view and represent an unfulfilled pledge.

7. WSCT-TV contends further that the proposed transaction, although apparently insulated from the no-profit rule as a *pro forma* assignment, is a patent violation of the letter and spirit of the policies underlying that rule. In arguing that the staff's reliance on Section 73.3597(a)(3) "stands the Commission's policy goals on their head," WSCT-TV claims that the staff used this exception to avoid dealing with the fact that the permittee and its principal will profit by the transaction. WSCT-TV asserts that the transaction involving HSN Virginia hardly represents a *pro forma* change and that a permittee must establish an absence of profit when an "economic transaction" is involved. Next, WSCT-TV argues that the staff's reliance on *Radio WABZ, supra*, is inapposite and that this case should be distinguished. Rather, WSCT-TV claims that this matter is controlled by *Merrimack Valley Communications, Inc.*, 20 FCC 2d 161 (1969) ("*Merrimack*"), in which the Commission held that a permittee corporation should be precluded from selling a minority interest of its authorized but unissued shares for a profit because such a sale would

[5] At the request of the staff, Urban filed executed copies of the Letter of Intent; a shareholder's agreement and a right of first refusal and put/call agreement pertaining to the UBC stock; UBC's Articles of Incorporation, bylaws, and corporate charter; HSN Virginia's stock subscription agreement; and an unexecuted copy of a Home Shopping Club affiliation agreement.

[6] *Radio WABZ* held that a private, for-profit sale of stock comprising less than controlling interest in a permittee corporation does not involve "the kind of speculation which the antitrafficking rules of Section 73.3597 were designed to prevent." 51 RR 2d at 43.

[7] Urban asserts that WSCT-TV lacks standing to file an application for review in that it is not a "person aggrieved" within the meaning of Section 1.115(a) of the Commission's Rules because WSCT-TV and its former shareholder, Formula Telecommunications, Inc. no longer exist as corporate entities. Urban had also challenged WSCT-TV's standing to file an informal objection against the assignment application. The staff determined that "even though WSCT-TV no longer exists as a legal corporation, its former shareholders are not prohibited from registering their concerns regarding this *pro forma* application" and that no demonstration of standing was required because Section 73.3587 of the Commission's Rules permits the filing of an informal objection by any person prior to Commission action on the application. Although we agree with Urban that a dissolved corporation cannot be aggrieved, we shall, in our discretion, consider the application for review as an informal request for Commission action.

violate the spirit of the "antitrafficking" rules. In that case the Commission required the existing shareholders to make further contribution to the corporation to bring the value of their shares up to that which the corporation sold its unissued shares to new shareholders. *Id.*

8. In opposition, Urban contends that WSCT-TV's arguments concerning Urban's alleged minority preference in the comparative proceeding are based on misapprehension of the facts. Urban states that the comparative case was not predicated on Urban's ability to construct a minority owned and oriented television station, nor was the grant of the application based on a minority preference. Rather, Urban asserts that its application was granted because White proposed complete quantitative integration of ownership with management whereas the competing applicants did not. Urban confirms that White will fulfill his pledge to serve as General Manager of WTMW. Urban states further that White will remain in control of the station and that the permittee maintains its ability to finance construction and operations of the Channel 14 facility. Finally, Urban affirms WTMW's programming obligations, notwithstanding the Home Shopping Club affiliation agreement, by echoing the staff's statement that, "UBC is obligated to provide programming responsive to issues confronting its community, and the affiliation agreement does not bar a discharge of this obligation."

9. With regard to the no-profit rule, Urban states that the *pro forma* assignment of the WTMW construction permit is expressly exempt from the rule because White will retain a 100-percent voting interest in UBC. Further, Urban asserts that even if HSN Virginia exercises its option to acquire 45 percent of the voting shares, White will still retain an absolute controlling interest in UBC with his 55-percent voting interest. Next, Urban maintains that *Radio WABZ*, and not *Merrimack*, is the controlling precedent in the case at hand. Urban argues that the Commission in *Radio WABZ* held that the sale of less than a controlling interest in a construction permit violates neither the letter nor the spirit of the no-profit rule. Urban points out that in *Radio WABZ* the Commission distinguished *Merrimack* in that the sale of the minority interest in *Radio WABZ* did not involve a public offering of stock, but a private sale at a price negotiated by the parties. Urban contends that the transaction in this case, like that in *Radio WABZ*, is a private sale of a minority equity interest in WTMW at a price ($45,000) negotiated by Urban and HSN Virginia.

10. In its reply to Urban's opposition, WSCT-TV maintains that the integration advantage Urban received would have never survived the hearing process under the facts as they now exist. WSCT-TV also disagrees with Urban's contention that White will be in control of WTMW in light of the Home Shopping Network's involvement in the financing and programming of the station. Lastly, WSCT-TV argues that, even if *Merrimack* does not apply to this private sale of a minority interest in the permittee, *Radio WABZ* can easily be distinguished here because the profits are "too huge" to be overlooked; WSCT-TV claims that the permittee's sole shareholder will receive $975,000 and the assignor (Urban) will obtain $1.15 million.

DISCUSSION

11. *Urban's Comparative Case* We have examined the extensive record compiled in the comparative proceedings involving the applicants for the Channel 14 construction permit, and we find that the facts alleged by WSCT-TV regarding Urban's minority preference do not comport with the record. In resolving the comparative issues facing the applicants, the Review Board held that Urban was the superior applicant under the Commission's integration criterion and was thus entitled to a preference over its rivals. *Washington's Christian Television Outreach, Inc.*, 99 FCC 2d at 426. Because Urban proposed the full-time integration of White, Urban's quantitative integration factor was 100 percent. *Id.* at 410. In addition, Urban was entitled to a qualitative enhancement of its integration credit since White had been a long-time resident of the service area and is a member of a minority group. *Id.* While the applicant with the next highest quantitative integration credit (WSCT-TV with 78.04 percent of full-time credit) was also awarded qualitative enhancements of its credit because "minority and women held a 78.04-percent interest in WSCT-TV," the Board noted that it is well established that qualitative attributes, such as minority ownership, may enhance the value of integration proposals but cannot overcome clear quantitative differences. *Id.* at n. 50; *citing Alexander S. Klein, Jr.*, 86 FCC 2d 423,428-29 (1981), and *Van Buren Community Service Broadcasting, Inc.*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981). We have already declined to review and reconsider the Board's findings in this regard. *See Washington's Christian Television Outreach, Inc.*, 59 RR 2d 787 (1985), 59 RR 2d 1679 (1986). Thus, the comparative grant to Urban was based on its clear quantitative advantages, not on any qualitative minority enhancement. It is also clear from the record in this *pro forma* application proceeding that White will maintain his 100-percent integration well beyond the one-year holding period for new stations. *See* 47 C.F.R. §73.3597(a). Therefore, the *pro forma* change of the permittee corporation has not materially altered any commitments by Urban to the extent that the integrity of our licensing processes has been infringed. In addition, WSCT-TV has raised no issues of misrepresentation on the part of White or Urban.

12. Further, to the extent that WSCT-TV alleges that the loans from HSN Communications to UBC give rise to a question of a *de facto* transfer of control, we disagree. We have determined that a debt financing agreement, without more, does not confer a cognizable interest in the creditor because no direct influence or control pertains to such financial arrangements. *Multiple Ownership Rule*, 97 FCC 2d 997, 1022 (1984). The loan and stock pledge agreements on file with the Commission give HSN Communications no powers, expressed or implied, to control the permittee. As we previously stated, even if HSN Virginia exercises its option to convert its nonvoting stock to voting, White would still maintain control over the station as a singlemajority shareholder with a 55-percent equity and voting interest.

13. *Financial Qualifications of Urban* At the time of the Channel 14 hearing, an applicant for a new television station was required to demonstrate its financial ability to construct the proposed station and operate it for three months. An applicant did not need to demonstrate a "firm financial commitment," but rather it only needed a "reasonable assurance" that the necessary funds would be available. *See Revision of Application for Construction Per-*

mit for Commercial Broadcast Stations (FCC Form 301), 4 FCC Rcd 3853, 3859 (1989). Urban clearly established its financial qualifications in the Channel 14 comparative proceeding. In fact, we specifically rejected a previous challenge to Urban's financial qualifications by WSCT-TV. *See Washington's Christian Television Outreach, Inc.*, 59 RR 2d 1679, 1681. In declining to add a financial issue, we stated, "a financial issue will be added after designation for hearing only in cases of misrepresentation or gross omission of an item that would render a proposal totally defective." *Id.* WSCT-TV has provided no evidence of misrepresentation or gross omission and/or fraud on our process. The substitution of HSN Virginia as the financing source does not constitute the kind of change giving rise to questions of misrepresentation. As we have observed, projected expenditures and sources of funds relied upon by applicants in establishing their financial qualifications frequently change and are rarely carried out as planned. *See Revision of Form 301*, 50 RR 2d 381, 382 (1981); *KRPL, Inc.*, 5 FCC Rcd 2823 (1990). Accordingly, we find no basis for reviewing UBC's financial qualifications.

14. *Unbuilt Station/No-profit Rule* Our long-standing policy is to grant construction permits only to qualified applicants who have the capacity and bona fide intention to construct the proposed facilities and to render a broadcast service. *See Scott & Davis Enterprises, Inc.*, 54 RR 2d 868, 869 (1983); *Calhoun County Broadcasting Co.*, 57 RR 2d 641, 646 (1985); and cases cited therein. In furtherance of this policy, the no-profit rule for unbuilt stations (formerly at Section 1.597) was implemented to supplement the "three-year rule"[8] and to further preclude "trafficking" in broadcast authorizations by barring the use of such permits as a means of obtaining financial gain from their transfer of control before the original grantee builds and operates the station. *Assignment and Transfer of Construction Permits for New Broadcast Stations (Section 1.597 of the Commission's Rules)*, 16 FCC 2d 789 (1969). This "antitrafficking" policy was aimed at preventing a licensee or permittee (or its principals) from acquiring and/or operating a station for the sole purpose of selling or otherwise disposing of it for profit rather than for the primary purpose of serving the public interest. *See Harriman Broadcasting Co. (WXXL)*, 9 FCC 2d 731,733 (1968), *aff'd sub nom., Crowder v. F.C.C.*, 399 F.2d 569 (D.C. Cir. 1968). To that end, we have required assignors and transferors of construction permits for unbuilt stations to demonstrate that what they are receiving in exchange for the construction permit, if anything, represents only their legitimate and prudent out-of-pocket expenses. *See* 47 C.F.R. §73.3597(c)(3). However, in cases of *pro forma* transfers and assignments effectuated with a short-form application, prior Commission practice has never required applicants to make these showings because the original grantee maintains control.

15. In 1982, we eliminated the three-year rule and the underlying anti-trafficking policy in favor of permitting market forces to govern sales transactions. *Amendment of §73.3597 of the Commission's Rules (Applications for Voluntary Transfers of Control)*, 52 RR 2d 1081 (1982), *on reconsideration*, 99 FCC 2d 971 (1985); *see also*, 4 FCC Rcd 1710 (1989) (denying Petition for Notice of Proposed Rule Making), *aff'd sub nom., Office of Communication of the United Church of Christ v. F.C.C*, 911 F.2d 813 (D.C. Cir. 1990). However, we retained the restrictions on unbuilt construction permit assignments and transfers for profit and imposed a one-year holding period after operation commences for stations which are obtained as a result of grant through comparative hearing or pursuant to the Commission's minority ownership policies. Our primary rationale for keeping the noprofit rule intact and for maintaining a one-year holding period was "to maintain the integrity of the Commission's licensing processes. ..." *Amendment of §73.3597*, 52 RR 2d at 1089. The one-year rule does not apply to *pro forma* transfers. 47 C.F.R. §73.3597(a)(3).

16. The assignment application under review here clearly involves a *pro forma* transaction. *See* 47 C.F.R. §73.3540(f)(5). White retains 100 percent of the voting rights in the permittee and would still maintain a 55-percent equity and voting interest in the station if HSN Virginia exercises its option to convert its nonvoting interest into a voting interest. Thus, even if HSN Virginia converts, its interest would not be cognizable in view of White's single-majority shareholder status. Because we believe the no-profit rule in Section 73.3597, like the one-year rule, should not be applied to *pro forma* applications, we find that the staff's treatment of Urban's application was consistent with the no-profit rule. Excluding this *pro forma* transaction was also consistent with the spirit and intent of the no-profit rule, inasmuch as the permit remains under the control of the original permittee who is moving forward to construct and operate a broadcast station in Arlington, Virginia. There is no indication that White's intentions to construct the facility are any less genuine now than they were when the Commission granted Urban the construction permit. Finally, a question is raised by the staff's reference to *Radio WABZ* and the ensuing debate in the pleadings over which case, *Radio WABZ* or *Merrimack*, represents appropriate Commission precedent. The holdings in these cases were based not on the no-profit rule itself (no assignment or transfer applications were involved in either case), but rather on concerns which predated the elimination of our antitrafficking policy. Our focus now, as indicated above, is to maintain the integrity of our processes, not on trafficking *per se*. Accordingly, we shall review future cases involving the sale of noncontrolling interests in unbuilt stations from that perspective. To that extent, therefore, *Merrimack* and *Radio WABZ* will not be followed.

CONCLUSION

17. We have examined the application for review, the responsive pleadings, the record which led to the staff's grant of Urban's *pro forma* assignment application, and the record which resulted in the grant of the Channel 14 construction permit to Urban. We find that the staff fairly considered and properly denied the informal objection.

[8] The three-year rule required applications for assignments or transfers of stations operating for less than three years be designated for hearing absent an applicable exemption, extenuating circumstances, or meritorious petitions for waiver.

We find further that WSCT-TV fails to raise a substantial and material question of fact warranting a hearing regarding any issue presented.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, the application for review filed by WSCT-TV, Inc. IS DENIED.

19. IT IS FURTHER ORDERED, That copies of this Memorandum Opinion and Order shall be sent Certified Mail -- Return Receipt Requested to the parties to this proceeding by the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-314

In the Matter of

Amendment of the Commission's Rules to Establish New Personal Communications Services

Pioneer's Preference Requests of:

Adelphia Communications Corp.	PP-41
Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc.	PP-42
American Telephone and Telegraph Company	PP-43
American TeleZone	PP-44
Ameritech	PP-45
Bell Atlantic Personal Communications, Inc.	PP-46
Broadband Communications Corporation	PP-47
Cable USA, Inc.	PP-48
Cellular Service, Inc.	PP-49
Comcast PCS Communications, Inc.	PP-50
Corporate Technology Partners	PP-51
Cox Enterprises, Inc.	PP-52
Ericsson Business Communications, Inc.	PP-53
Fleet Call, Inc.	PP-54
Freeman Engineering Associates, Inc.	PP-55
Grand Broadcasting Corporation	PP-56
Iowa Network Services, Inc.	PP-57
Omnipoint Communications, Inc.	PP-58
Omnipoint Corporation, Oracle Data Publishing, Inc. and McCaw Cellular Communications, Inc.	PP-59
Omnipoint Mobile Data Company	PP-60
Pacific Bell	PP-61
PacTel Corporation	PP-62
PageMart, Inc.	PP-63
Panhandle Telephone Cooperative, Inc.	PP-64
PCN Communications Inc.	PP-65
PerTel, Inc.	PP-66
Pulson Communications Corporation	PP-67
Qualcomm Incorporated	PP-68
Radio Telecom and Technology, Inc.	PP-69
SATCOM, Inc.	PP-70
SCS Mobilecom, Inc.	PP-71
SM Tek, Inc.	PP-72
Spatial Communications, Inc.	PP-73
Suite 12 Group	PP-74
Tele-Communications, Inc.	PP-75
Telmarc Telecommunications Co.	PP-76
TRX Transportation Telephone Company	PP-77
Viacom International, Inc.	PP-78

ORDER DENYING REQUEST TO DEFER COMMENT DATE

Adopted: June 5, 1992; Released: June 8, 1992

Comment Date: June 10, 1992
Reply Comment Date: June 25, 1992

By the Office of Engineering and Technology:

1. On June 3, 1992, GTE Service Corporation and its affiliated domestic telephone operating, satellite and cellular companies (GTE) requested that the time for filing comments in the above-captioned proceeding be extended from June 10, 1992 to August 10, 1992.

2. In its request, GTE states that this extension is warranted by the need to carefully evaluate more than 4,000 pages of technically complex material. GTE notes that a thirty day extension of time was previously granted in this proceeding to permit a more careful evaluation of less than half the number of pioneer's preference applications that are now before the Commission. According to GTE, only a limited number of persons are qualified to assess these applications, and it is unreasonable to now expect that more than twice as many applications can be assessed absent an extension longer than 30 days.

3. The Commission does not routinely grant extensions of time.[1] While we concur with GTE that our present comment deadline requires a major effort of parties that wish to carefully evaluate all 38 pending pioneer's preference requests, we believe that such an evaluation is possible. Further, we believe it is in the public interest to arrive at a judgment on pioneer's preference in this proceeding as soon as possible. Therefore, we find that the present comment period is appropriate. Accordingly, IT IS ORDERED, that the request to defer the comment date in this proceeding IS DENIED.

4. This action is taken pursuant to authority found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241, and 1.46 of the Commission's

[1] 47 C.F.R. Section 1.46 (1991).

Rules, 47 C.F.R. Sections 0.31, 0.241, and 1.46. For further information, contact Rodney Small, Office of Engineering and Technology, (202) 653-8116.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of CanXus Broadcasting
Corporation, Licensee of Radio
Station WCXU-FM, Caribou, Maine

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1992; Released: June 16, 1992

By the Chief, Mass Media Bureau:

1. The Chief, Mass Media Bureau, pursuant to Section 0.283 of the Commission's Rules, has under consideration (1) a $10,000 Notice of Apparent Liability (NAL) adopted September 9, 1991, and issued on September 19, 1991, and (2) the response, received on November 25, 1991, of Dennis H. Curley, president of CanXus Broadcasting Corporation (CanXus), licensee of Radio Station WCXU-FM, Caribou, Maine.

2. The forfeiture was assessed for CanXus' unauthorized assumption of control of Radio Station WKZX-AM, Presque Isle, Maine in violation of Section 310(d) of the Communications Act of 1934, as amended[1], and Section 73.3540 of the Commission's Rules.[2] In response to the NAL, CanXus disagrees with several of the Commission's findings and requests that the Commission rescind the forfeiture. In the alternative, CanXus requests that the forfeiture be reduced.

3. Initially, CanXus disagrees with the Commission's decision to impose a forfeiture against CanXus rather than against Colonial Broadcasting Company (Colonial), the licensee of Station WKZX-AM. CanXus maintains that, since the complaint that initiated the investigation alleged that Colonial abdicated control of WKZX to CanXus, Colonial, rather than CanXus, should bear any sanctions. We disagree. The Commission concluded not only that Colonial abdicated control of WKZX to CanXus, but that CanXus exercised unauthorized control of the station. Since both Colonial and CanXus were involved in this unauthorized course of conduct, sanctions could be imposed against either party, or against both. Furthermore, the course of conduct between the parties suggests that CanXus played a more active role and benefitted more from the prohibited conduct than Colonial. Accordingly, the Commission, acting within its proper discretion, decided to proceed against CanXus.

4. CanXus also contends that no unauthorized assignment could have occurred because Colonial Broadcasting always owned the physical assets of Station WKZX and continued to pay all financial obligations on these assets. Although this assertion may be true, this factor is not dispositive in determining whether an unauthorized assignment has occurred. In making such a determination, the Commission traditionally looks beyond legal title and examines who actually controls station finances, personnel matters, and programming. *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981). Even if one of these indicia of control is not dispositive in itself, it may, nevertheless support a finding of unauthorized assignment when viewed with other indicia in the overall context of the course of conduct between the parties. Accordingly, in issuing the NAL, the Commission looked beyond the legal title of WKZX's assets and examined the conduct of Colonial and CanXus in the overall context of their agreements and ongoing interactions.

5. CanXus asserts that it merely "managed" the day to day funds of WKZX and that Mr. Freeman, the president of Colonial Broadcasting, retained ultimate control of the station's finances because he authorized the arrangement and could have terminated it at will. We reject this assertion because it ignores the overwhelming financial control exercised by CanXus over WKZX. CanXus paid all WKZX's operating expenses after August 31, 1987, using CanXus checks imprinted with the name of WKZX. CanXus also collected accounts receivable of WKZX through August 31, 1987, and was eventually to repay this money to Colonial. Such repayment apparently never occurred because the financial operations of CanXus and WKZX became virtually indistinguishable shortly after September 1, 1987, as the revenues of the two entities became increasingly co-mingled. Although Colonial apparently paid WKZX's mortgage payments, insurance, and real estate taxes due after August 31, 1987, and Colonial's president, Mr. Freeman, may have retained some degree of control over WKZX's advertising rates, CanXus played a dominant role in actually collecting revenues and paying most of WKZX's operating expenses. Accordingly, we reiterate our original conclusion that CanXus exercised financial control over most of WKZX's operations.

6. CanXus further asserts that it did not exercise control over the personnel of WKZX. We disagree with this assertion. Pursuant to the agreements between Colonial and CanXus, Colonial terminated all its employees effective September 1, 1987. At the same time, Dennis Curley, the president of CanXus, was named Vice President of Colonial and General Manager and Chief Operator of Station WKZX. Curley thus became the only employee of Colonial, but was paid by CanXus. CanXus then hired some former Colonial personnel for operational and sales functions at WKZX. Although Mr. Freeman of Colonial subsequently handled some personnel related paperwork, CanXus apparently paid the salaries of these employees since, under the agreements between Colonial and CanXus, CanXus was responsible for all of WKZX's contractual obligations after September 1, 1987. Thus, effective September 1, 1987, Colonial was no longer contractually obligated to these employees and could not hire them, fire them, give them raises, or discipline them since as of that date they had become CanXus employees. All of these powers rested solely in the hands of Dennis Curley as the owner of CanXus.

7. CanXus also asserts that it made no intentional or substantial public representations of control over WKZX. More specifically, CanXus challenges particular findings of the Commission concerning the issue of whether CanXus held itself out to the public as controlling WKZX. First, CanXus questions the Commission's partial reliance on an affidavit of Jerry L. Gagnon, a former employee of CanXus. This affidavit stated, in part, that on August 31, 1987, ". . . Mr. Curley announced to me and other employees that CanXus had filed documents with the FCC

for the transfer and everything would be final in approximately 90 days." The NAL referred to this affidavit by stating ". . . you announced to Gagnon and WKZX employees that CanXus had filed documents with the Commission to transfer the license of WKZX and that the transfer would be final within approximately 90 days." CanXus argues that the Commission misread the affidavit since Gagnon did not work at the WKZX studio itself, but rather at the WCXU facility in Caribou, and that Curley made no such announcement to WKZX employees, but rather to WCXU employees. Although the affidavit is silent about Gagnon's precise location when Curley made the announcement, this information is beside the point since Gagnon unequivocally states that Curley did make the relevant announcement. Since the affidavit does not specify which station the "other employees" worked at, it is possible that the Commission erroneously assumed that they were WKZX employees. Even if the Commission did err in making this assumption, however, the error is harmless since Curley acknowleges that he publicly represented to CanXus employees that CanXus was planning to acquire WKZX and was going to commence operating the station immediately.

8. CanXus also takes issue with the Commission's interpretation of a news release issued jointly by Colonial and CanXus on August 31, 1987. This release was issued on letterhead bearing the logos of both WKZX and WCXU, and listed the names and addresses of Colonial and CanXus. The release announced the programming arrangement between Colonial and CanXus, and stated that WKZX "will become a sister station to WCXU" and ". . . is being transferred to CanXus Broadcasting Corporation - the owners of WCXU - upon FCC approval." The release also stated "We have notified the FCC of this arrangement." The Commission noted that at least two newspapers wrote articles based on this press release. One newspaper conveyed the impression of an imminent transfer of the license of WKZX, while the other referred to the transfer as an accomplished fact. Apparently, some listeners had the impression that CanXus owned WKZX. In a letter published in the *Fort Fairfield Review*, on August 30, 1989, responding to one such listener who apparently wrote a letter to the newspaper, Dennis Curley denied that CanXus owned WKZX. CanXus first argues that the Commission disregarded the wording in the press release that indicated the proposed transfer would be subject to FCC approval and that CanXus cannot be held responsible for how a newspaper interprets a press release. CanXus also argues that the Commission overlooked a letter written by Curley to the editor of the *Fort Fairfield Review* denying that CanXus owned WKZX.

9. CanXus is incorrect in asserting that the Commission overlooked or disregarded the wording in the press release and the letter written by Curley. The Commission fully considered these documents which CanXus offered as a defense, but finds them unpersuasive as such. In arguing that these documents are exculpatory, CanXus overlooks several facts. First, the wording "upon Commission approval" is a standard formality in virtually all sales agreements and is no more indicative of actual control over a station than is legal title to a station's assets. Second, the phrase itself was false in this context since no assignment application was filed with the Commission until January 1988, more than three months after CanXus had already assumed de facto control. Furthermore, Curley's letter to the editor of the newspaper denying that CanXus owned WKZX was written in August 1989, and could be viewed as self-serving since the Commission's investigation was already underway. Accordingly, although these documents in themselves do not necessarily establish a premature transfer of control, or demonstrate any wrongdoing, neither do they rebut the other evidence of a premature transfer.

10. With regard to public representations of ownership of WKZX, CanXus finally argues that during station identification, WKZX was always identified as being owned and operated by Colonial Broadcasting. Although this may be true, CanXus sent strong contrary messages to both individuals and the public at large. In a letter dated October 30, 1987, from Dennis Curley to a CanXus employee working at WKZX, Curley explicitly referred to himself as the licensee of WKZX. Curley argues that this correspondence was intended to be private in nature and should not be construed as a public representation of CanXus's control over WKZX. The public or private nature of this document is irrelevant. The fact remains that Curley unequivocally represented himself in writing to a third party as the licensee of WKZX. Furthermore, in November 1987, in response to a questionnaire for the 1988 edition of *Broadcasting Yearbook*, Curley listed CanXus as the licensee of WKZX "subject to FCC approval." In fact, at that time such approval would have been impossible since Colonial and CanXus did not even file an assignment application with the Commission until January 1988. CanXus finds "particularly objectionable" the Commission's use of an "overall context" to conclude that CanXus made public representations of ownership of WKZX. In reaching its conclusions about such public representations, the Commission merely evaluated the conduct of CanXus in the overall context of its dealings with Colonial and how it portrayed those dealings to the public, using the established legal standard for analyzing de facto control situations.

11. CanXus also overlooks two misstatements it made to the public concerning its represention to the FCC and to the Commission itself. First, contrary to the assertion in the press release that Colonial and CanXus had notified the FCC of the management and programming agreements, the Commission was never notified of these agreements prior to the submission of the assignment application in January 1988. Even once CanXus had submitted the assignment application, it still failed to notify the FCC of the existence of these agreements. Question 2 of the assignee's portion of the assignment application specifically asked whether the sales contract submitted with the application embodied the full and complete agreement between the parties. In fact, the sales agreement did not embody the full and complete agreement between the parties. Yet, in response to this question CanXus simply wrote "DNA" meaning "does not apply" and made no mention of the management and programming agreements with Colonial Broadcasting. In light of the misstatement by CanXus in its press release, this omission by CanXus on the assignment application could, in the presence of other compelling evidence, reasonably be viewed as indicating a misrepresentation to the Commission. CanXus was fortunate in that the Commission did not find other compelling evidence of misrepresentation, sufficient to designate WCXU for a license revocation hearing.

12. CanXus also argues that its billing invoices clearly indicated that Colonial owned WKZX and that CanXus owned WCXU. Although separate logos may have ap-

peared on some invoices, the fact is that CanXus handled all finances for both WKZX and WCXU to the point where the finances of the two stations became virtually indistinguishable due to co-mingling of funds. Furthermore, as noted by the Commission in the NAL, all expenses for WKZX were paid using CanXus checks imprinted with the name of WKZX. In addition, CanXus often included WKZX on CanXus stationery letterhead. Although CanXus claims it engaged in these practices to minimize check and stationery printing fees, such practices in reality facilitated the virtual integration of financial and business operations between Colonial and CanXus, and reinforced public perceptions that CanXus owned WKZX.

13. In addition to its response to the Commission's substantive findings, CanXus asserts that it cannot afford to pay the forfeiture and requests a reduction in the amount of the forfeiture. In support of its assertion of financial hardship, CanXus submits a "balance sheet" covering the first 8 months of its operations in 1991, as well as various statistics about economic conditions in Maine. Although these general economic conditions are unfortunate, they do not relate directly to the financial resources of CanXus itself. Furthermore, the "balance sheet" provided does not meet the requirements set forth in the attachment to the NAL given the specific caveat of the accountant who prepared it which states that it does not conform to generally accepted accounting principles. The financial information as presented does not, therefore, warrant a reduction in the forfeiture.

14. Accordingly, pursuant to Section 503(b) of the Communications Act as amended, IT IS ORDERED that CanXus Broadcasting Corporation, licensee of Radio Station WCXU-FM, Caribou, Maine, FORFEIT to the United States the sum of Ten Thousand Dollars ($10,000) for the willful and repeated violation of 47 U.S.C. § 310(d) and 47 C.F.R. § 73.3540. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum and Order, a check or similar instrument payable to the Federal Communications Commission. In regard to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

FOOTNOTES

[1] Section 310(d) of the Communications Act of 1934, as amended, states in relevant part:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

[2] Section 73.3540(a) of the Commission's Rules states:

Prior consent of the FCC must be obtained for a voluntary assignment or transfer of control.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-623
CC Docket No. 88-2, Phase I

In the Matter of

Bell Atlantic's
Notice and Petition
for Removal of the Structural
Separation Requirement
and Waiver of Certain State
Tariffing Requirements

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 1992; Released: June 8, 1992

By the Chief, Common Carrier Bureau:

1. On March 9, 1992, Bell Atlantic filed with the Commission a petition for structural relief, pursuant to the *BOC Safeguards Order*,[1] and an explanation of why it had not met Open Network Architecture (ONA) state tariffing requirements for certain services. We find that Bell Atlantic has adequately demonstrated that a waiver of the state tariffing requirement is appropriate for each of the ONA services in the particular states it identifies. We also find, in view of our grant of a waiver, that Bell Atlantic has made the requisite showing for a grant of its petition for structural relief. Accordingly, we grant Bell Atlantic's petition.

2. In the *BOC Safeguards Order*, the Commission concluded that Bell Operating Company (BOC) provision of enhanced services pursuant to nonstructural safeguards would serve the public interest, and established conditions for the removal of the structural separation requirement for BOC provision of enhanced services. Each BOC must, as detailed in the *BOC Safeguards Order*, demonstrate that it: 1) has federal tariffs in effect for each of its initial interstate ONA services; 2) is technically prepared to offer each of its initial ONA services; and 3) has filed state tariffs for each of its initial ONA intrastate services.[2]

3. In its petition, Bell Atlantic certifies that, with the exception of a limited number of services for which it has not filed state tariffs, it has taken all of the steps specified for initial ONA implementation, and it petitions the Commission for removal of the structural separation requirement.[3] Bell Atlantic claims that no intrastate access tariffs were filed in the District of Columbia because all access in the District is interstate.[4] Bell Atlantic also states that it has not filed intrastate tariffs for "Public Data Network" (PDN) packet-switched basic service arrangements (BSA), and the associated packet-switched basic service elements (BSEs), in Delaware or the District of Columbia due to a lack of intrastate demand, although it states that these services are available in the interstate tariffs throughout the Bell Atlantic region.[5] Bell Atlantic states that it will make available on an individual case basis (ICB) those services identified in its ONA Plan with insufficient intrastate demand to warrant a general tariff offering.[6] Bell Atlantic states that "Ultra Forward" will be delayed several months in some jurisdictions due to technical problems, but it will file tariffs by mid-1992 and make the service available in all jurisdictions by the third quarter of 1992.[7]

4. MCI opposes Bell Atlantic's petition and argues that it would be arbitrary and capricious for the Commission to grant structural relief while relying partly on the federal tariffs Bell Atlantic filed for initial ONA services, because the federal tariffs do not properly implement ONA goals.[8] MCI further argues that Bell Atlantic's state tariffs are deficient because they reflect neither the fundamental unbundling necessary to bring about ONA nor the economical pricing necessary to encourage the competitive provision of enhanced services. MCI states that the proposed elimination of intrastate switched access feature group services, as proposed for Virginia, would be disruptive to interexchange carriers.[9] MCI also asserts that Bell Atlantic has not met the Commission's requirement that it file state tariffs for intrastate ONA services, nor has it sought a waiver of that requirement.[10]

5. We do not find that any of the substantive reasons raised by MCI preclude our granting of Bell Atlantic's petition. First, MCI disagrees with Commission policy on nonstructural safeguards and the effective implementation of ONA. In the *BOC Safeguards Order*, the *BOC ONA* proceeding, and the *Part 69/ONA Order*, the Commission addressed arguments about the appropriateness of lifting the structural separation requirement, the role of state tariffs in the ONA process, and the pricing of interstate ONA services.[11] This order merely implements the Commission's decision to substitute nonstructural safeguards

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[1] *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*).

[2] *BOC Safeguards Order*, 6 FCC Rcd at 7624-7625 n.212.

[3] Bell Atlantic Petition at 1-2.

[4] Bell Atlantic Petition, Notes to Certification at 1.

[5] *Id.* at 1.

[6] *Id.* at 1-2. Bell Atlantic cites Appendix B of the Amendments to its ONA Plan filed April 15, 1991 for the list of services available on an individual case basis. In its petition, Bell Atlantic states that it will file a general intrastate tariff for these services when demand is sufficient. *Id.* at 2. Bell Atlantic also states that it will notify enhanced services providers of the availability of these services in the ONA Services Users Guide twice each year, and it will append to its publicly available intrastate ONA tariff transmittal in each jurisdiction a list of descriptions of ICB services. *Id.* Bell Atlantic also states that its enhanced service operations will use only generally tariffed services. *Id.* at 2, n.4.

[7] *Id.* at 1. Bell Atlantic states that tariffs are effective in Maryland and have been filed in Virginia and the District of Columbia. *Id.*

[8] MCI Comments at 3.

[9] *Id.* at 5.

[10] *Id.* at 8.

[11] *BOC Safeguards Order* 6 FCC Rcd at 29-30, 44-55; Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, 4 FCC Rcd 1, 162-171 (1988) (*BOC ONA Order); modified on reconsideration*, 5 FCC Rcd 3084 (1990) (*ONA*

for structural separation; it is not the proper forum for parties to reargue the merits of the Commission decisions in these proceedings.

6. Second, we disagree with MCI's contention that Bell Atlantic failed to meet the state tariffing requirement. Bell Atlantic's proposed Virginia state tariffs that unbundle intrastate switched access are consistent with the Commission's decision on the unbundling of interstate access feature groups in the *Part 69/ONA* proceeding.[12] Moreover, we conclude that Bell Atlantic has adequately demonstrated that a waiver is appropriate for each of the initial intrastate ONA services it identifies, provided that Bell Atlantic complies with conditions to which it stipulated in its filing.[13] We require that Bell Atlantic file state tariffs for Ultra Forward as soon as it is technically feasible. We also require that Bell Atlantic clearly indicate in its state tariffs those intrastate ONA services available on an individual case basis and that it file general tariffs for these services as soon as there is sufficient demand.[14] With these conditions, we grant Bell Atlantic a limited waiver of the state tariffing requirement of the *BOC Safeguards Order*.

7. We therefore consider whether, in view of our grant of a waiver of the state tariffing requirement for certain services, Bell Atlantic has made the requisite showing for structural relief. We conclude that it has. First, Bell Atlantic certifies that it is technically prepared to offer each of its initial ONA services consistent with its ONA plan, or has received a waiver permitting it to delay tariffing the services. Second, Bell Atlantic certifies that it either has effective federal tariffs for these services, or has received a waiver not to file federal tariffs for these services. Third, with our grant of a waiver, Bell Atlantic has satisfied the requirement that it file state tariffs for its initial ONA services. Based on its certifications and its stipulations, we grant Bell Atlantic's petition for structural relief.

8. Bell Atlantic must continue to comply with the BOC ONA plan and reporting requirements established in the *BOC Safeguards* and *ONA* proceedings.[15] In the *BOC ONA Further Amendment Order* the Commission required that the BOCs file further amendments and annual reports on their progress in implementing ONA.[16] In addition, in the *BOC Safeguards Order*, the Commission stated that it would review nonstructural safeguards after all the BOCs have operated under a full ONA environment for three years.[17] We grant Bell Atlantic's petition subject to these ongoing requirements.

9. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. Sections 0.91 and 0.291, a waiver for Bell Atlantic of the initial state tariffing requirement for certain intrastate ONA services IS GRANTED.

10. IT IS FURTHER ORDERED, that Bell Atlantic's Petition for Removal of the Structural Separation Requirement IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Reconsideration Order); 5 FCC Rcd 3103, 3112-3113 (1990) (*BOC ONA Amendment Order), Erratum,* 5 FCC Rcd at 4045, *pets. for recon. pending, pets. for rev. pending, California v. FCC* (9th Cir. No. 90-70336, filed July 5, 1990; 6 FCC Rcd 7646, 7663-7664 (1991) (*BOC ONA Further Amendment Order), pet. for rev. pending, MCI Telecommunications Corp. v. FCC and USA* (DC Cir. No. 92-1074, filed Feb. 19, 1992); *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers,* Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, 6 FCC Rcd 4524 (1991) (*Part 69/ONA Order), pets. for recon. pending.*

[12] We note that issues related to the elimination of the feature groups are the subject of petitions for reconsideration and will be addressed in that proceeding.

[13] *See supra* para. 3.

[14] *Id.*

[15] In the *BOC ONA Amendment Order,* the Commission required that BOC enhanced services operations take the same access to certain BOC operations support systems (OSS) that BOCs provide to independent enhanced services providers once structural separation requirements are lifted. 5 FCC Rcd at 3108. Several BOCs filed petitions for reconsideration and clarification of this requirement. Accordingly, we waive the same access to OSS requirement for Bell Atlantic pending a Commission decision on these petitions.

[16] *BOC ONA Further Amendment Order,* 6 FCC Rcd at 7649-7650, Appendix B.

[17] *BOC Safeguards Order,* 6 FCC Rcd at 7625.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 9, 1992

CONSUMER ALERT
TELECOMMUNICATIONS TOLL FRAUD

Second in a Series

Unfortunately, telecommunications fraud is not a new problem. It existed in the past, exists today, and continues to move to new technologies. Any person or business -- large or small -- can fall victim to toll fraud. Every day calling card numbers are being stolen, private branch exchange (PBX) systems are being used fraudulently to make calls across state lines or to foreign countries, and people claiming to be law enforcement officials or telephone company representatives trick unsuspecting consumers into accepting the charges for calls or divulging their calling card numbers. These fraudulent calls may mean large telephone bills for unsuspecting consumers.

While the Commission and the telecommunications industry are working together to develop solutions to this problem, consumers also need to be involved. We urge consumers to take preventative steps *now* to avoid possible financial losses from fraud associated with telephone services and equipment.

This Consumer Alert outlines different types of toll fraud, identifies steps consumers can take to detect it and lessen their chances of becoming victims, and informs consumers what they can do if they become victims of toll fraud.

WHAT ARE SOME EXAMPLES OF TOLL FRAUD?

Private Branch Exchange (PBX) Fraud - Remote Access

Businesses that use private branch exchange (PBX) equipment may be vulnerable to toll fraud through remote access features in their equipment. Remote access features allow business employees who are away from the office, such as sales agents in the field, to call the PBX and then, after entering an authorization code, receive a new dial tone for an outgoing call that will be billed to the outgoing telephone line connected to the PBX. In some cases, an 800 service call may be used for the incoming call to the PBX. Unauthorized people may use computers to call a PBX and to test random authorization codes until the correct one is found. Once the correct authorization code is found, calls can be made that will be billed to the PBX owner. If an incoming 800 line has been used, the PBX owner may be billed for the 800 calls as well.

Voice Mail Fraud

Voice mail users can be victims of toll fraud. Some voice mail systems may have features that provide a link to a PBX remote access feature or that give a caller a dial tone after the main voice mail function has finished. These features can be used to make outgoing calls that will be billed to the voice mail user or PBX owner. Unauthorized people may attempt to use a voice mail system to arrange third number billing to the telephone number served by the system.

Calling Card Fraud

Many consumers use local or long distance telephone company-issued calling cards. Unauthorized people may try to obtain calling card and personal identification (PIN) numbers by watching callers dial their numbers or by overhearing them read to an operator at a public pay telephone. They also may call people at their home or business requesting number verification. Cards also may be lost through theft or loss of a wallet or purse.

Third Number Billing Or Collect Call Fraud

Sometimes unauthorized people pose as FCC, telephone company, or law enforcement officials and ask the subscriber to accept billing for calls as part of a "sham" investigation. Telephone company operators unwittingly can be used by unauthorized people to place fraudulent calls. The unauthorized person may tell an operator to bill a call to a third telephone line, such as a line serving a pay telephone or a line serving a PBX, or may use a pay telephone to accept collect calls. Unauthorized people also may attach calling devices directly to a telephone line and then place outgoing calls or accept collect calls that, in both cases, would be billed to the subscriber of the line.

WHAT CAN BUSINESSES DO TO PROTECT THEIR SYSTEMS FROM TOLL FRAUD?

1) Contact your equipment vendor, your local telephone company, and your long distance telephone company to determine what security systems are available to protect your equipment and telephone service from toll fraud, and what monitoring services are available to help you quickly detect unusual usage.

2) Determine if your authorization codes are susceptible to fraudulent usage. Many long distance carriers recommend that you use as many digits in these codes as possible. Changing access codes frequently also is recommended.

3) Take steps to safeguard the security of your authorization codes. Regularly remind employees of the need to keep codes secure. Remove codes from voice mail bulletin boards; do not write codes on credit card receipts; do not provide codes to unknown callers; and delete all unneeded codes, including default codes installed by the equipment manufacturer.

4) Disable any part of your system that is not in regular use.

5) Consider disabling your system during non-business hours.

6) Ask your equipment vendor and local or long distance telephone company about limiting international calls or blocking calls to countries that you do not normally call.

7) Consider using a voice recording, rather than a steady tone, to signal when to enter an authorization code.

HOW CAN CONSUMERS PREVENT UNAUTHORIZED PEOPLE FROM OBTAINING THEIR CALLING CARD NUMBERS?

1) Whenever possible, use a telephone that reads your calling card number from the magnetic strip on the back of the card. If this type of telephone is unavailable, take steps to prevent others from watching you dial your number or overhearing you give your number to an operator.

2) Immediately report a lost or stolen calling card to the local or long distance telephone company that issued it. The company will cancel your card and issue you a new one.

3) Avoid using your telephone calling card as identification for consumer purchases or cashing checks.

4) Do not provide your card number to unknown persons. Telephone companies already have this information for their calling card customers and therefore would not ask you for your number.

5) Educate cardholders with whom you share cards on how to protect their card numbers. Emphasize the need not to disclose the numbers to other people.

ARE CONSUMERS RESPONSIBLE FOR PAYING UNAUTHORIZED CALLING CARD CHARGES?

Your liability for unauthorized use of a calling card can be as much as $50 under the Truth in Lending Act and Federal Reserve Board regulations. You should *immediately* contact your local or long distance company to discuss the charges *and* to cancel your calling card if an unauthorized person has obtained your calling card or calling card number.

WHAT ACTION SHOULD CONSUMERS TAKE IF THEY SUSPECT THAT A CALL IS A TOLL FRAUD ATTEMPT?

1) Advise the caller that you are going to call the telephone company yourself to make sure that a problem exists.

2) Immediately hang up and call your local telephone company or the long distance telephone company identified by the caller to determine if a problem exists with your telephone line or telephone bill. You also may wish to contact the company's security office.

3) Never accept third number billing or collect calls unless you are absolutely certain of the caller's identity and the purpose of the call.

4) If you do not normally accept third number billing or collect calls, you may wish to discuss with your local telephone company a blocking service for your line to prevent such calls from being billed to your number.

5) Contact local or federal law enforcement officials.

WHAT IF CONSUMERS HAVE ACCEPTED THE CHARGES FOR SOME FRAUDULENT CALLS?

You should contact your local telephone company and the long distance company identified on your bill as the carrier of the fraudulent calls. You may also contact local or federal law enforcement officials. You should make these contacts as soon as you realize that something suspicious has happened.

WHAT FEDERAL LAW ENFORCEMENT AGENCIES CAN CONSUMERS CONTACT IF THEY BECOME VICTIMS OF TOLL FRAUD?

Consumers can contact the Federal Bureau of Investigation (FBI) by writing to the FBI, 7799 Leesburg Pike, South Tower, Suite 200, Falls Church, VA 22043. The FBI and the Electronic Crimes Division of the United States Secret Service jointly investigate telecommunications fraud.

HOW CAN CONSUMERS KEEP UP-TO-DATE ON TOLL FRAUD ISSUES?

The FCC seeks to keep consumers advised of developments in the telecommunications industry by issuing public notices or fact sheets. The first *Public Notice* addressing toll fraud was released by the FCC on April 19, 1991. Copies of the *Public Notice* can be obtained by writing to the FCC, Informal Complaints Branch, 2025 M Street, N.W., Suite 6202, Washington, D.C. 20554.

WHAT IS THE TELECOMMUNICATIONS INDUSTRY DOING TO PREVENT FRAUD?

The major long distance telephone companies have established fraud prevention programs and are actively working with their customers to assist them in protecting their telecommunications systems and services from fraud. You should contact your long distance telephone company for specific program offerings.

WHERE CAN CONSUMERS GET FURTHER INFORMATION ON TOLL FRAUD?

The Communications Fraud Control Association, a nonprofit organization, serves as a clearinghouse for consumer information and complaints regarding toll fraud. This association is located at 2033 M Street, N.W., Suite 402, Washington, D.C. 20036 (telephone: (202) 298-8900).

DOES THE FCC HANDLE COMPLAINTS INVOLVING TELEPHONE BILLINGS FOR FRAUDULENT CALLS?

Yes, the FCC does have authority to handle complaints that involve billing disputes that arise from acts of interstate or international toll fraud. You should *first* call your local telephone company if the billing page was included with your local telephone bill or if the long distance company was identified on the billing page. If you are unsuccessful in your attempts to resolve the complaint yourself, you can file a complaint with the FCC. A copy of the telephone bill or bills listing the disputed charges should be included with the complaint. There is no special form to fill out. You can simply write a letter in your own words to:

Informal Complaints and Public Inquiries Branch
Enforcement Division, Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W. - Suite 6202
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ADVANCED COMMUNICATION
TECHNOLOGIES,
Complainant,

v. File No. E-92-22

MCI TELECOMMUNICATIONS
CORPORATION,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: June 9, 1992; Released: June 18, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On December 26, 1991, Advanced Communication Technologies (ACT) filed the above-captioned formal complaint alleging that MCI Telecommunications Corporation (MCI) had engaged in unreasonable and discriminatory practices in violation of Sections 201 and 202 of the Communications Act. On February 6, 1992, MCI filed a motion to dismiss ACT's complaint and an answer and verified counterclaim seeking to recover $210,417.00 in charges for telecommunications services allegedly provided to ACT, plus costs and attorney fees.

2. On February 18, 1992, ACT filed a request for withdrawal of its complaint along with an answer and a motion to dismiss MCI's counterclaim. Subsequently, on February 28, 1992, MCI filed a motion requesting dismissal of its counterclaim. We are satisfied that dismissal of the complaint and counterclaim will serve the public interest by eliminating the need for the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the request for withdrawl of the above-captioned complaint, filed by ACT on February 18, 1992, IS GRANTED.

4. IT IS FURTHER ORDERED that the request for dismissal of MCI's verified counterclaim, filed by MCI on February 28, 1992, IS GRANTED.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-313

In the Matter of

Policies and Rules Concerning
Operator Service Providers

ORDER ON RECONSIDERATION

Adopted: June 9, 1992; Released: June 18, 1992

By the Commission:

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I. INTRODUCTION

1. On April 9, 1991, this Commission adopted comprehensive regulations regarding certain practices and telephone service offerings of operator service providers (OSPs) and the call aggregators with whom they contract to provide operator services.[1] In this Order on Reconsideration, we affirm the regulations we previously adopted and clarify several portions of the *April Report and Order* as they pertain to OSPs.[2] Specifically, this Order clarifies: (1) that OSPs may provide the first audible identification or "brand" before or immediately after the bong tone, and that OSPs using automated equipment that route calls to other OSPs based on the billing information provided by the consumer may brand immediately after the input of such billing information so that the consumer hears only the brand of the OSP who is actually handling the call; (2) that the OSP named in the brands must be consistent with the OSP named in the written information posted on or near the telephone by the aggregator; (3) that OSPs in equal access areas who cannot subscribe to a form of access that provides answer supervision capability are prohibited from "knowingly" billing for unanswered calls; and (4) that OSPs using automated equipment may route emergency calls to a live operator for handling.[3]

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[1] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Report and Order, 6 FCC Rcd 2744 (1991) (*April Report and Order*).

[2] Appendix A lists the parties participating, as well as the abbreviations we use throughout this Order to refer to those parties.

[3] Intellicall filed a Motion for Stay Pendente Lite requesting the Commission stay certain rules pending resolution of its petition for reconsideration. The Motion for Stay is now moot as a result of this action and is dismissed accordingly.

Ameritech filed a Petition for Temporary Partial Waiver, which it amended, for waiver of the requirement that it provide the first brand prior to the bong tone for five months from the date the Commission denies or lifts the stay requested by Intellicall. Our action today makes Ameritech's petition moot and, accordingly, we dismiss the petition.

HFCC requested that the Commission reconsider its interpretation of Section 64.703 "as applied specifically to HFCC's 37 modified locations so that branding after the bong tone is allowed." *See* HF Communications Corporation's Petition for Reconsideration and/or Clarification (HFCC Petition) at 4. Our action today makes this request moot. HFCC further requests that it be allowed 18 months to install double-branding at 56 properties. HFCC Petition at 5. The requirement that OSPs provide a second brand is statutory as well as contained in the Commission's rules. This Commission has no authority to waive the statutory requirement in question. Accordingly, HFCC's request for a schedule to convert its properties from single- to double-branding is denied. The requirement to provide a second brand under the Telephone Operator Consumer Services Improvement Act was effective on January 15, 1991, and we expect all OSPs to be in compliance with this requirement.

Finally, RCI Long Distance, Inc. (RCI) filed a Motion for Leave to File Out of Time (RCI Motion) and an Opposition to Petition for Clarification or Limited Reconsideration. The RCI Motion was filed twenty-five days after the date for filing oppositions to the petitions for reconsideration had passed as well as past the date for filing replies. The Commission requires that good cause be shown to accept a late filing. RCI had made no such showing. We also note that the issue raised by RCI has been raised by other parties to the proceeding and will be

II. BACKGROUND

2. On June 14, 1990, this Commission adopted the initial Notice of Proposed Rule Making in CC Docket No. 90-313,[4] in which we proposed specific rules aimed at solving problems in the operator services industry that had persisted despite previous Commission action. We asked interested parties to express their views on a number of related issues and proposals.[5]

3. Prior to final action by the Commission on the *NPRM*, Congress passed the Telephone Operator Consumer Services Improvement Act,[6] which was signed into law in October 1990. The purpose of TOCSIA is "to protect consumers who make interstate operator services calls from pay telephones, hotels, and other public locations against unreasonably high rates and anticompetitive practices."[7]

4. Under TOCSIA, this Commission was required to, *inter alia*, conduct a "general" rule making proceeding beyond the scope of the initial *NPRM* and prescribe regulations to implement statutory provisions and establish certain standards and policies, and establish a monitoring/reporting proceeding that will ultimately result in three reports to Congress on the progress in achieving the goals and objectives set forth in TOCSIA.[8] On December 21, 1990, we released a Further Notice of Proposed Rule Making.[9] The rules proposed in the *FNPRM* supplanted those proposed in the initial *NPRM*. On April 9, 1991, after reviewing comments filed by numerous interested parties, the Commission adopted the regulations that are the subject of the petitions for reconsideration that are addressed in this Order.

III. DISCUSSION

A. Section 64.703 -- Branding

1. Timing of First Brand

5. In the *April Report and Order*, the Commission stated that the first brand, required by Section 64.703(a),[10] must occur prior to the bong tone and, for automated systems, prior to the validation of a billing number provided by the consumer and before the bong tone.[11] A number of parties have urged us to reconsider the requirement that the first brand occur before the bong tone as well as the requirement that automated systems also provide the brand at that time.

6. APCC argues that this requirement would needlessly require numerous OSPs to retrofit their equipment so that the first brand could be provided before the bong tone.[12] In addition, APCC points out that various OSPs use different branding practices, including branding before the bong tone, branding after the bong tone and branding after the input of billing information.[13] With regard to store-and-forward (S&F)[14] OSPs, APCC contends that it would be more efficient for S&F systems to brand after the input of billing information because some calls made at automated phones must be transferred to another carrier based on the billing information provided by the consumer. Such a transfer would be necessary either because the card used by the consumer cannot be validated by the automated OSP or because the consumer's billing preference (e.g., collect or third party billing) is not offered by that automated OSP.[15] APCC further argues that allowing the first brand after the input of billing information will ensure that the OSP handling the call will be the OSP identified in the brand.[16] Intellicall and PTC also urge us to allow the first brand after the bong tone for the same reasons advanced by APCC.[17] In further support, USTA

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considered by the Commission. For the foregoing reasons, we deny the RCI Motion. We will, however, treat RCI's filing as a permissible *ex parte* presentation. *See* 47 C.F.R. § 1.1206.

[4] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Notice of Proposed Rule Making, 5 FCC Rcd 4630 (1990) (hereinafter *"NPRM"*). This action was partially in response to a petition for rule making filed by the National Association of Regulatory Utility Commissioners as well as our growing awareness that significant problems persisted in the operator services industry. *See* Petition of the National Association of Regulatory Utility Commissioners, RM-6767 (filed April 17, 1989).

[5] *NPRM*, 5 FCC Rcd at 4631-35, 4637-38 (these related issues included double branding, charging for unanswered or uncompleted calls, and standards for the handling of emergency calls).

[6] Pub. L. No. 101-435, 104 Stat. 986 (1990) (to be codified at 47 U.S.C. § 226) ("TOCSIA").

[7] S. Rep. No. 439, 101st Cong., 2d Sess. 1 (1990) (*Senate Report); see also* H. R. Rep. No. 213, 101st Cong., 1st Sess. 2 (1989) ("The purpose of [the Act] is to protect telephone consumers against unfair prices and practices of some operator service providers (OSPs), yet allow the legitimate companies in the industry the opportunity to compete in the market.")

[8] TOCSIA directs the Commission to monitor OSP rates, complaints filed against OSPs, various costs of providing operator service, innovations in the provision of operator services, and compliance with the requirements of TOCSIA. *See* Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, Order, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) and Public Notice, DA 91-1005 (Com. Car. Bur. 1991). The initial report of the Commission pursuant to TOCSIA was submitted to Congress on May 14, 1991. The second report was submitted to Congress on November 14, 1991. The third and final report is due on November 14, 1992.

[9] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Further Notice Of Proposed Rule Making, 6 FCC Rcd 120 (1990) (hereinafter *"FNPRM"*).

[10] Section 64.703(a) of the Commission's rules, 47 C.F.R. § 64.703(a), provides that

> Each provider of operator services shall:
>
> (1) identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call.

Accord 47 U.S.C. § 226(b)(1)(A).

[11] *April Report and Order*, 6 FCC Rcd at 2757.

[12] Petition for Reconsideration of the American Public Communications Council (APCC Petition) at 1-2.

[13] *Id.* at 2.

[14] "Store-and-forward," as well as "bong-in-the-box," devices are microprocessors located within telephones that perform automated call completion and billing services.

[15] APCC Petition at 5.

[16] *Id.* at 5-6.

[17] Petition for Clarification and Partial Reconsideration filed by Intellicall (Intellicall Petition) at 5-10; Petition for Clarification and Partial Reconsideration filed by PTC (PTC Petition) at 2-5. Intellicall also points out that [c]onsumers will not be deprived of the opportunity to make an informed choice if the brand

points out that Section 226(b)(1) of TOCSIA requires only that a brand occur at the beginning of the call, but does not require the first brand to occur prior to the bong tone.[18]

7. MCI was the only party opposed to allowing the brand after the bong tone, arguing that permitting the brand after the bong tone is inconsistent with TOCSIA.[19] MCI argues that Congress intended that the two required brands be distinct events in order to ensure that consumers are aware of the OSP's identity.[20]

8. We are persuaded that allowing OSPs to brand either before or immediately after the bong tone, except as indicated below, is consistent with TOCSIA. The legislative history of TOCSIA requires only that the first brand occur at the beginning of the call; it does not specify that the first brand occur prior to the bong tone.[21] Our goal of ensuring that consumers can make an informed choice of OSP will be furthered by allowing the first brand before or immediately after the bong tone without imposing additional costs on OSPs to retrofit their systems.

9. With regard to OSPs using automated equipment[22] that will under certain circumstances transfer a call to another carrier, we find that it is consistent with TOCSIA to allow that brand after the input of billing information. This approach should help minimize consumer confusion by avoiding situations where a consumer hears the brand of the OSP using automated equipment, inputs billing information, hears the brand of a second OSP that will actually be handling the call, and then hears yet a third brand by the latter OSP prior to connection of that call. We note that OSPs using automated equipment who brand after the input of billing information (and do not transfer a call as described above) and OSPs to whom a call is transferred must also provide a second brand before the call is connected and before the consumer incurs any charge for the call in compliance with Section 64.703(c) of the Commission's rules.[23] We caution that any such transfers by an OSP using automated equipment must not result in call splashing[24] in violation of Section 64.705(a)(3) of the Commission's rules.[25]

2. OSP Named in Brand

10. In the *April Report and Order*, we held that to the extent that multiple parties are involved in setting rates for particular operator services, these parties may jointly decide which party will be named in the brand.[26] We prohibited parties from branding in the name of another party if that party has not consented to the use of its name in the brand.[27]

11. Bell Atlantic asks that the Commission clarify that the OSP identified in the brand must be consistent with the OSP identified in the signage posted by the aggregator and also with the local exchange carrier's (LEC's) presubscription and billing records.[28] Bell Atlantic also contends that the cost of modifying signs should be borne by the carrier that causes the change.[29]

12. APCC agrees that branding and signage should be consistent. APCC, however, is opposed to Bell Atlantic's request that the Commission adopt rules regarding which entity bears the cost of signage modification.[30] APCC also opposes Bell Atlantic's request that branding be consistent with LECs' presubscription records because in the case of independent or competitive pay telephones, LEC presubscription records do not necessarily identify the presubscribed OSP for TOCSIA compliance purposes.[31] APCC also points out that pay telephone providers may choose not to have a primary interexchange carrier (PIC), and, accordingly, there may be no "presubscribed" carrier reflected in the LEC's records.[32]

13. Ameritech supports Bell Atlantic's general request that the Commission require branding to be consistent with posted information at all pay telephones. In the case of LEC telephones, Ameritech requests that the Commission clarify that brands and posted information be consis-

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sounds immediately after the bong. The bong and brand are sufficiently close in time that consumers listening for the bong will also generally hear the brand." Intellicall Petition at 9.

[18] Partial Opposition of the United States Telephone Association to Petitions for Reconsideration (USTA Opposition) at 1-2. Section 226(b)(1)(A), 47 U.S.C. § 226(b)(1)(A), provides that each OSP shall "identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call." *See also* Reply of the American Public Communications Council to Opposition to Petition for Reconsideration.

[19] Opposition to Petitions for Reconsideration or Clarification filed by MCI (MCI Opposition) at 2-3.

[20] *Id.* at 3.

[21]

> The purpose of this provision is to ensure that consumers are informed of the identity of the carrier handling their call.
>
> * * *
>
> By identifying itself at the beginning of the call, the carrier ensures that the consumer has the opportunity to hang up or request a transfer of the call before the call is put through and before the consumer incurs a charge for the call.

Senate Report at 12.

[22] "OSPs using automated equipment" refers to OSPs using S&F, bong-in-the-box, and other automated technologies. *See* n. 14, *supra*.

[23] 47 C.F.R. § 64.703(c); *accord* 47 U.S.C. § 226(b)(2).

[24] "Call splashing" is

> the transfer of a telephone call from one provider of operator services to another such provider in such a manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or unwillingness, is prevented from billing the call on the basis of such location.

47 C.F.R. § 64.708(c); *accord* 47 U.S.C. § 226(a)(3).

[25] 47 C.F.R. § 64.705(a)(3); *accord* 47 U.S.C. § 226(b)(1)(H). We further caution that we will be sensitive to consumer complaints regarding mis-billing or double billing of these calls.

[26] *April Report and Order*, 6 FCC Rcd at 2757.

[27] *Id.*

[28] Bell Atlantic's Petition for Clarification or Limited Reconsideration at 1-2.

[29] *Id.* at 1.

[30] Comments of the American Public Communications Council on Petitions for Reconsideration (APCC Comments) at 4-5.

[31] *Id.* at 5.

[32] *Id.*

tent with LEC presubscription records.[33] Finally, Ameritech agrees with APCC that consistency between branding and LEC presubscription records for competitive pay telephones is often not possible because there may be no PIC affiliated with a competitive pay telephone or the traffic may be routed to an OSP other than the OSP in the LEC's records.[34]

14. MCI opposes Bell Atlantic's request, claiming that in instances where an OSP contracts with a subcontractor to perform the operator services function, the LEC's records will not accurately reflect the OSP providing the service.[35]

15. In its reply comments, Bell Atlantic acknowledges that it will not be able to identify the presubscribed carrier for competitive pay telephones.[36] Nonetheless, Bell Atlantic requests that, in all other cases, the Commission should require that branding, signage, and LEC presubscription records be consistent.[37]

16. We are not persuaded that requiring branding to be consistent with a LEC's presubscription records will further the goals of TOCSIA or this Commission of providing consumers with sufficient information to make informed choices from among competing OSPs. We reiterate that parties involved in rate setting may agree on the name to be used in the brands.[38] We emphasize, however, that branding and signage must be consistent in all instances.[39] The OSP named in the brands must be the OSP identified in the signage posted by aggregators at their telephones. To require otherwise would lead to consumer confusion rather than achieve the Commission's goal of informed consumers using the OSP of their choice. We will not address the issue of who should pay for a signage change, because that issue is best treated as a private matter to be worked out between the parties involved. We note that "aggregators" are responsible for placing correct signage on their telephones and joint aggregators are jointly responsible for complying with posting requirements of Section 64.703(b) of the Commission's rules. Further, each OSP must ensure that each aggregator for whom such OSP is the presubscribed OSP complies with the posting requirement. *See* 47 C.F.R. § 64.703(e); *accord* 47 U.S.C. § 226(b)(1)(D).

B. Section 64.705-- Billing for Unanswered Calls

17. Section 64.705(a) of the Commission's rules, 47 C.F.R. § 64.705(a),[40] requires that OSPs not bill for unanswered telephone calls in areas where equal access is available and not knowingly bill for unanswered telephone calls where equal access is not available.

18. In the *April Report and Order*, we stated that OSPs in equal access areas are prohibited from billing for unanswered calls.[41] Both Intellicall and PTC have challenged this requirement, requesting that we clarify that CPE-based OSPs[42] that do not receive network answer supervision, even in those areas that have been converted to equal access, should be prohibited from *knowingly* billing for unanswered calls.[43] Intellicall argues that the AT&T Consent Decree, Commission decisions, and the *Senate Report* make clear that "equal access" "is not merely the provision of Feature Group D service.[44] Intellicall contends that answer supervision is a necessary part of equal access.[45] APCC supports this request.[46] The parties argue that the legislative history of TOCSIA supports the clarification request and that answer supervision is the *sine qua non* of equal access under TOCSIA. No party has opposed this request for clarification.

19. We are persuaded that some clarification of Section 64.705(a) is appropriate. A review of the legislative history of TOCSIA indicates Congress' concern that "[i]f the carrier subscribes to a form of access that does not include 'answer supervision', there is no way for the carrier to 'know' whether any of those calls was answered."[47] Indeed, while answer supervision is available in equal access end offices, the record in this proceeding does not support a finding that answer supervision is available to all OSPs in equal access areas.[48] Accordingly, OSPs in equal access areas that cannot subscribe to a form of access that provides answer supervision capability are prohibited from knowingly billing for unanswered calls under Section

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[33] Reply Comments to Bell Atlantic's Petition for Clarification or Limited Reconsideration filed by Ameritech (Ameritech Comments) at 5.

[34] *Id.* at 4-5.

[35] MCI Opposition at 1-2.

[36] Bell Atlantic's Reply to Comments on its Petition for Clarification or Limited Reconsideration at 2.

[37] *Id.* at 2-3. Bell Atlantic points out that it uses its presubscription records to place signs on its pay telephones. *Id.* at 2.

[38] Of course, nothing would preclude any entity that uses its own records to prepare signage for its telephones from requiring, through contract or some other means, that it be apprised of any changes regarding service to those telephones.

[39] We note that "XYZ Telecommunications Corporation" may brand as "XYZ" and meet our requirement for consistency between signage and branding.

[40] *Accord* 47 U.S.C. § 226(b)(1)(F)-(G).

[41] *April Report and Order*, 6 FCC Rcd at 2764.

[42] Intellicall defines "CPE-based OSPs" as OSPs who provide operator services primarily through automated response equipment that is located at the aggregator premises, such as competitive pay telephones and hotel private branch exchanges (PBXs). Intellicall Petition at 1, n.3. These include "store and forward" and "bong-in-the-box" OSPs as well as OSPs using other automated technologies.

[43] *See generally* Intellicall Petition at 10-15; PTC Petition at 5-7.

[44] Intellicall Petition at 10-11. Feature Group D provides interexchange carriers with, among other things, "1+" service, a 10XXX access code, and a trunk-side connection to the LEC end office. Feature Group D access is only available in LEC end offices that have been converted to equal access.

[45] *Id.* at 11 (citing to Appendix B of the AT&T Consent Decree and *MTS/WATS Market Structure*, CC Docket 78-72, Phase III, 100 FCC 2d 860, 876 (1985)); *see also* PTC Petition at 6.

[46] APCC Comments at 2-3.

[47] *Senate Report* at 14.

[48] The record reflects that no LEC has challenged the assertion that answer supervision is unavailable to competitive pay telephones. We note further that some parties have taken the position that "answer supervision" contemplated by Section 64.705(a) means "unbundled answer supervision." *See, e.g.*, Intellicall Petition at 15, n.22. TOCSIA's legislative history, however, speaks only in terms of a "form of access that provides answer supervision," not in terms of unbundled answer supervision. *See Senate Report* at 14. Issues regarding the precise form or terms of answer supervision are beyond the scope of this proceeding.

64.705(a)(2) of the Commission's rules.[49] We caution, however, that as answer supervision becomes available to these OSPs, such OSPs will be held to the strict standard contained in, Section 64.705(a)(1) of the Commission's rules.[50] Further, we stress that OSPs in equal access areas that *can* subscribe to a form of access that provides answer supervision capability are prohibited from billing for unanswered calls [regardless of whether they choose to subscribe to such access]. An OSP may not avoid the requirement of Section 64.705(a)(1) of the Commission's rules simply by choosing not to subscribe to a form of access that includes answer supervision capability if that type of access is available.

C. Section 64.706 -- Immediate Routing of Emergency Calls

20. In the *April Report and Order*, this Commission adopted a minimum standard regarding the handling of emergency calls by OSPs. We require OSPs to connect an emergency call immediately to the emergency service provider that responds to the type of reported emergency at the site of the emergency, if known, or, if not known, to the originating location of the call.[51]

21. Intellicall and PTC request that we clarify that, in the case of an OSP using automated equipment, the immediate routing requirement is satisfied if the call is routed to a live operator who will then process the emergency call.[52] Intellicall and PTC argue when a caller dials 0- or some other network access code that does not indicate that the call is an emergency, the automated OSP cannot identify the call as an emergency without allowing the consumer to speak with a live operator.[53] APCC supports Intellicall's and PTC's petitions arguing that the Commission should allow OSPs to follow any reasonable procedure that will ensure the immediate routing of emergency calls.[54] USTA, while not opposed to the clarification, argues that the amount of time between dialing the initial 0- and the next action (e.g., being prompted in some way to reach a live operator) should be limited to a specified number of seconds.[55]

22. We find that, in the case of automated systems, it is not unreasonable for the OSP to satisfy our immediate routing requirement by having the consumer follow a call sequence that allows them to speak with a live operator who will process the emergency call. We note that the emergency standard we have adopted is a minimum standard that is not intended to preempt state emergency call standards.[56] We will not, at this time, prescribe a set amount of time between the dialing of any sequence to initiate an emergency call and the connection of the consumer with a live operator although we expect such a transfer to be completed as quickly as possible. We caution that we will further consider the need for such action if we find that emergency calls are being unreasonably delayed because of this arrangement. We reiterate that states may adopt requirements that go beyond the minimum requirements embodied in the Commission's rule.

D. Section 64.708(b) -- Definition of Aggregator

23. Both TOCSIA and the Commission's rule define "aggregator" as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services."[57]

24. The Commission determined that "[e]ach entity that exercises control over telephone equipment, whether through ownership of the equipment, control of access to the equipment or some other means, will be responsible as an 'aggregator' under [TOCSIA] and our rules."[58] We further stated that joint aggregators are equally responsible for compliance with TOCSIA and the Commission's rules.[59]

25. NTCA argues that the Commission's decision with regard to joint aggregator responsibility is arbitrary and capricious. NTCA contends that LECs should be exempt from aggregator responsibilities if they lease a phone to a premises owner at an aggregator location and do not arrange for or offer operator services at that location.[60] NTCA argues that the Commission's failure to specify the entity responsible for compliance with the aggregator requirements of TOCSIA will lead to confusion, increase the possibility of non-compliance, and lead to finger-pointing by joint aggregators when questions regarding compliance arise.[61] NTCA further argues that LECs must relinquish physical control over equipment under the contractual arrangements between premises owners and pay telephone owners and are therefore not in a position to comply.[62]

26. USTA supports NTCA's request. It notes that while the Commission stated that access and control of the equipment should determine who is to comply with TOCSIA, the Commission has made carriers equally re-

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[49] 47 C.F.R. § 64.705(a)(2); *accord* 47 U.S.C. § 226(b)(1)(G).

[50] 47 C.F.R. § 64.705(a)(1); *accord* 47 U.S.C. § 226(b)(1)(F).

[51] *April Report and Order*, 6 FCC Rcd at 2767.

Section 64.706 of the Commission's rules, 47 C.F.R. §64.706, provides that

> Upon receipt of any emergency telephone call, a provider of operator services shall immediately connect the call to the appropriate emergency service of the reported location of the emergency, if known, and, if not known, of the originating location of the call.

[52] Intellicall Petition at 17-18; PTC Petition at 8-9. Intellicall also points out that the vast majority of 0- calls are not emergency calls.

[53] Intellicall Petition at 17-18; PTC Petition at 8-9.

[54] APCC Comments at 3.

[55] USTA Opposition at 3-4. "[I]t should take no more than ten seconds from the completion of the dialing of 'O-' for an operator service provider to make the next connection, and normally much less." USTA Opposition at 4.

[56] *See April Report and Order*, 6 FCC Rcd at 2767.

[57] 47 C.F.R. § 64.708(b); *accord* 47 U.S.C. § 226(a)(2). On February 6, 1992, the Association of College and University Telecommunications Administrators (ACUTA) along with the American Council on Education and the National Association of College and University Business Officers filed a Petition for Clarification (ACUTA Petition) regarding the status of universities as "aggregators" with respect to telephones located in dormitory rooms. This issue will not be addressed herein, but rather is being addressed separately in response to the ACUTA Petition. *See* Public Notice, 7 FCC Rcd 1926 (1992).

[58] *April Report and Order*, 6 FCC Rcd at 2751.

[59] *Id.* at 2751-2752.

[60] Petition for Reconsideration of the National Telephone Cooperative Association at 3.

[61] *Id.* at 2.

[62] *Id.*

sponsible for compliance regardless of whether they have access and control.[63] USTA contends that the entity who has continuing access to and control of the equipment is in the best position to comply with TOCSIA and should be required to comply with its requirements.[64]

27. MCI and APCC oppose NTCA's request. MCI argues that joint responsibility should increase the likelihood of compliance with TOCSIA and the Commission's rules.[65] APCC does not believe that the Commission should relieve the LECs or the competitive pay telephone owners of the responsibility of ensuring that their phones are in compliance with TOCSIA.[66]

28. We have previously considered NTCA's and USTA's arguments in adopting the *April Report and Order*.[67] We found that the appropriate balance between the interests of the pay telephone owner and the premises owner was achieved by interpreting the definition of aggregator broadly enough to ensure compliance with the goals of ensuring the availability of consumer information and consumer choice.[68] We are not persuaded on reconsideration that this approach is incorrect. We noted in the *April Report and Order* that "in some situations" a pay telephone owner and a premises owner will have joint responsibility as aggregators because of their joint access to and control over the telephone equipment.[69] This is a determination that must be made based on the facts of each situation.[70] A blanket determination regarding who the aggregator is with regard to all pay telephones would not appear to further any Commission or TOCSIA goal. The adoption of a new rule exempting LECs from aggregator status in certain situations will likewise serve no useful purpose. Accordingly, we reaffirm our determination that joint aggregators are equally responsible for compliance with and equally liable for failure to comply with the requirements of TOCSIA and our rules. We point out that the Commission will not hesitate to take appropriate action under its forfeiture authority against entities violating its rules.[71]

E. Summary

29. The rules, as clarified in this Order, will help protect consumers from unfair and deceptive practices related to their use of operator services to place interstate telephone calls and ensure that consumers have the opportunity to make informed choices in making such calls.

IV. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 226, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 226, and 405, that the petitions for reconsideration, partial reconsideration and/or clarification filed in this proceeding ARE DENIED, except as provided herein.

31. IT IS FURTHER ORDERED that the Motion for Stay Pendente Lite filed on May 24, 1991 by Intellicall, Inc., and the Petition for Partial Temporary Waiver filed on May 23, 1991, and amended on June 17, 1991, by The Ameritech Operating Companies ARE DISMISSED; and that the Motion for Leave to File Out of Time filed on August 9, 1991 by RCI Long Distance, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PETITIONS

1. American Public Communications Council (APCC)
2. Bell Atlantic
3. HF Communications Corporation (HFCC)
4. Intellicall, Inc. (Intellicall)
5. National Telephone Cooperative Association (NTCA)
6. Public Telecommunications Council (PTC)

OPPOSITIONS

1. APCC
2. MCI Telecommunications Corporation (MCI)
3. United States Telephone Association (USTA)

REPLIES

1. APCC
2. Ameritech Operating Companies (Ameritech)
3. Bell Atlantic

[63] USTA Opposition at 2, citing *April Report and Order* at 14.
[64] *Id.* at 3.
[65] MCI Opposition at ¶ 4.
[66] APCC Comments at 4.
[67] *April Report and Order*, 6 FCC Rcd at 2750-2752.
[68] *Id.* at 2751.
[69] *Id.*
[70] *Id.*
[71] *See id.* at 2762.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Zapis Communications Corp. File No. BRH-890601XB

For Renewal of the License of
Station WZAK, Cleveland, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: May 18, 1992; Released: June 19, 1992

By the Chief, Audio Services Division:

1. This proceeding involves the application of Zapis Communications Corp. (Zapis) to renew the license of FM radio station WZAK, Cleveland, Ohio. Leodis Harris (Harris) filed a Petition to Deny the application (*Petition*).[1] Harris states that, as a Judge in the Juvenile Division of the Cuyahoga County Court of Common Pleas, he is concerned with the potential effect of WZAK's programming on the young people of Cleveland. He alleges that WZAK (1) airs sexually suggestive programming and promotions; (2) conducts contests that are disorderly and/or offensive to minorities; and (3) condones its Program Director's sexual harassment of women. Zapis filed an Opposition responding to these charges.

2. In assessing the merits of a Petition to Deny, the Commission is guided by Section 309(d)(1) and (2) of the Communications Act, 47 U.S.C. Sections 309(d)(1) and (2), as explained in *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). First, the Commission determines whether the petitioner makes specific allegations of fact that, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest. If so, then the Commission proceeds to examine and weigh all of the material before it, including any opposition, to determine whether there is a substantial and material question of fact requiring resolution in a hearing. Finally, the Commission must determine whether grant or denial of the application would serve the public interest. For the reasons set forth below, we conclude that the *Petition* does not raise questions of fact requiring a hearing or indicate that grant of the renewal application would be inconsistent with the public interest.

DISCUSSION

3. The majority of Harris' allegations deal with WZAK's programming decisions. In view of the Commission's sensitivity to the First Amendment rights of the public and of broadcasters, and the noncensorship provision of Section 326 of the Communications Act, 47 U.S.C. Section 326, the Commission affords a broadcaster considerable discretion in the programming that it presents. *See Mahoning Valley Broadcasting Corp.*, 39 FCC 2d 52, 58 (1972). With limited exceptions, such as obscene or indecent programming, the Commission generally reviews a licensee's programming only to determine whether the licensee has made a reasonable effort to deal with the problems of its community, through programming responsive to issues of importance to that area. *See Deregulation of Radio*, 84 FCC 2d 968, 982 (1981), *recon. granted in part and denied in part* 87 FCC 2d 797, *aff'd in relevant part and remanded in part sub nom. Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). Against this background, we examine each of Harris' allegations.

Sexually Suggestive Material

4. Harris alleges that WZAK's programming and promotional campaigns are sexually suggestive. In examining such claims, the Commission considers whether the broadcast material is "indecent," *i.e.*, if it depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 739 (1978). Broadcast of indecent material is actionable if the broadcast occurs at a time when there is a reasonable risk that children may be in the audience.[2] No terms are *per se* indecent, and words or phrases that may be patently offensive in one context may not rise to the level of actionable indecency in another context. *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, 932 (1987), *aff'd in part and remanded in part sub. nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). Therefore, to determine whether particular material is indecent, we must have sufficient information to examine both the language used and its context.

5. Harris has not made a *prima facie* case of actionable broadcast indecency. Much of the material to which Harris objects was not broadcast but rather used to promote WZAK on area billboards. The Commission does not regulate such non-broadcast material.[3] With respect to material that was broadcast over WZAK, Harris provides the titles of allegedly indecent material but provides no information from which the Commission might determine the actual language used or examine identified phrases in context. The mere titles: "We Get You Up and Off" (a promotional

[1] Jeffery D. Johnson, an elected member of the Cleveland City Council, and Reverend C. Jay Matthews, Pastor of the Mt. Sinai Baptist Church, join in Harris' Petition.

[2] A federal court has held unconstitutional a Commission rule that would have prohibited the broadcast of indecent material 24 hours a day. *Action for Children's Television v. FCC*, 932 F.2d 1504 (1991); *cert. denied* ___ U.S. ___, 117 L. Ed. 2d 507 (1992). The court remanded that case with instructions that the Commission establish a "safe harbor" during which material that may be indecent, but which is nevertheless constitutionally protected, may be broadcast. Until such time as a new "safe harbor" goes into effect, the Commission's enforcement authority continues to be limited to material broadcast between the hours of 6 a.m. and 8 p.m. *See, e.g., Kansas City Television, Ltd. (KZKC-TV)*, 4 FCC Rcd 6706 (1989). Harris identifies one song ("Put Your Mouth on Me") as being broadcast at 7:20 a.m., thus falling within our enforcement authority, if the song was indecent. However, Harris does not show that other allegedly indecent broadcasts occurred at times within our enforcement authority. With respect to these other broadcasts, the record shows only that the broadcasts occurred in the "morning" and in the "evening."

[3] Additionally, Harris' allegation that WZAK's promotional campaigns are designed to distort audience ratings does not

slogan for a morning show); "Put Your Mouth On Me" (a song title); and "Pillow Talk," "Just the Two of Us," and "For Lovers Only" (three titles of shows aired during evening hours) are insufficient to support a finding of indecency. *See Infinity Broadcasting Corp. of Pennsylvania,* 3 FCC Rcd 930, 932 (1987), *aff'd in part and remanded in part sub. nom. Action for Children's Television v. FCC,* 852 F.2d 1332 (D.C. Cir. 1988) (double entendre and innuendo must be examined in context). Furthermore, as discussed in note 2 *supra,* Harris does not provide us with the times at which most of the allegedly indecent material aired, making it impossible for us to determine whether broadcast of this material would be actionable. While we share Harris' concern about exposure of children to indecent material, we cannot from the information provided conclude that the material to which Harris objects is indecent or that it was aired at a time when there was a reasonable risk that children may have been in the audience.

Contests

6. Harris also makes several allegations concerning licensee-conducted contests promoted on WZAK. He states that several contests were disorderly and not conducted as announced, while others allegedly showed an insensitivity to minorities.

7. *Insensitivity to Minorities.* Harris states that two licensee-conducted contests: "The Biggest Cockroach Contest" and "The Big Butt Contest" were insulting to and stereotypical of minorities. As stated earlier, however, freedom of speech concerns dictate that the Commission rarely interfere with a licensee's individual programming decisions. This holds true even if the material broadcast is insulting to a particular minority or ethnic group in the station's community. "If there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable or congenial." *Anti-Defamation League of B'nai B'rith,* 4 FCC 2d 190, 192 (1966), *aff'd* 6 FCC 2d 385 (1967), *aff'd sub nom. Anti-Defamation League of B'nai B'rith v. FCC,* 403 F.2d 169 (1968), *cert. denied,* 394 U.S. 930 (1969). Further, we note that Harris' allegation of licensee insensitivity to minorities is limited to two individual programming decisions, and does not call into question the licensee's inclusion of minorities or issues of importance to minorities in the station's overall programming. *See Citizens Communications Center,* 25 FCC 2d 705, 707 (1970). Accordingly, we find no *prima facie* case.

8. *Disorderly and Other-Than-Announced Contests.* Harris also identifies two instances in which WZAK contests were allegedly unruly and conducted in a manner other than originally announced. With respect to a WZAK sponsored dance contest, Harris states that the crowd "swelled to unmanageable proportions" resulting in property damage, personal injuries, and traffic disruption. WZAK canceled the contest as a result of the unforeseen size of the crowd. In another instance, Harris alleges that a large crowd of listeners assembled at the station in response to WZAK's promise to give 20 dollars to the first 20 people to show up wearing underwear on their heads. He states that the crowd became unruly when the station decided to give 20 dollars to the first 100 people wearing underwear on their heads instead of to the first 20 as announced.

9. At one time, the Commission's regulation of licensee-conducted contests was designed to avoid property damage, traffic disruption, and other adverse consequences. *See Contests and Promotions Which Adversely Affect the Public Interest,* 6 RR 2d 671 (1966). In 1985, however, the Commission narrowed the scope of its contest regulation. *See Elimination of Unnecessary Broadcast Regulation,* MM Docket No. 83-842, 57 RR 2d 939 (1985). At that time the Commission stated that, while it does not encourage contests that disrupt the public safety, it recognizes that such matters are more appropriately handled at the local level.[4] *Id.,* 57 RR 2d 939 at 942. The Commission currently regulates licensee contests to the extent necessary to prevent contests that are false, misleading, or deceptive. *See Rules Relating to Licensee-Conducted Contests,* Docket No. 20500, 60 FCC 2d 1072, 1073 (1976). Toward this end, our rules require that licensees fully and accurately disclose the material terms of each contest, and conduct each contest substantially as announced. *See* 47 C.F.R. Section 73.1216.

10. The two contests in question do not appear false, misleading, or deceptive. With respect to the underwear contest, Harris has not made a *prima facie* case of any rule or policy violation. It appears that the underwear contest was conducted substantially as announced, with the licensee awarding all prizes announced in the manner announced to persons complying with the contest rules. The fact that the licensee then went on to give away additional unannounced prizes is not a violation of our rules. With respect to the dance contest, we find that Harris makes a *prima facie* case that the contest was not conducted substantially as announced (due to cancellation). Upon consideration of the licensee's response, however, we find that WZAK violated the letter but not the spirit of our rules. The licensee states that WZAK cancelled the dance contest only because the crowd was too large to be accommodated safely at the announced location. The licensee's underestimation of the number of people who would attend appears to have been an honest mistake in view of the date and time at which the contest was scheduled. The safety need to cancel the contest is confirmed by the injuries and the need for police intervention that resulted. Thus, WZAK's cancellation of the dance contest does not appear deceptive but rather a responsible action of a licensee discovering an unforeseen safety hazard. Accordingly, we find that although WZAK did not conduct the

initially fall within this agency's regulatory ambit but rather within that of the Federal Trade Commission or private litigation. *See Elimination of Unnecessary Broadcast Regulation,* MM Docket 83-842, 57 RR 2d 913, 916-17 (1985), *recon. denied,* 58 RR 2d 864, *aff'd sub nom., Telecommunications Research and Action Center v. FCC,* 800 F.2d 1181 (1986). While adjudicated findings of ratings distortion may have a potential bearing on an applicant's character, Commission consideration of such allegations in the first instance is not appropriate. *See Character Qualifications,* Gen Docket 81-500, 102 FCC 2d 1179, 1202 (1986). As there has been no adjudication of the charges of ratings distortion raised in the present case, these allegations do not raise a substantial and material question of fact in the renewal context. *See generally Kaye-Smith Enterprises,* 90 FCC 2d 27, 37 (1982).

[4] The record shows that local authorities ably handled the matters raised in this case. Police intervened in the dance contest and the Cleveland City Council temporarily suspended WZAK's ability to obtain permits to conduct contests on public property.

dance contest substantially as announced, this violation of Section 73.1216 of our rules occurred under circumstances that do not raise substantial and material questions of fact with respect to the station's renewal application or warrant imposition of sanctions.

Actions of the Program Director

11. Harris alleges that the licensee "allowed, encouraged, and condoned" inappropriate behavior of its Program Director, which led to the filing of a sexual harassment lawsuit.[5] Harris further alleges that the Program Director, in order to denigrate the plaintiffs in that case, formed a group named "Sexual Harassment" which performed on WZAK.

12. To the extent that Harris is objecting to the content of an individual song (which is not alleged to be obscene or indecent) or to the station's giving air time to a particular group, these matters would fall within the station's First Amendment rights. To the extent that Harris may be arguing that the station does not provide equal employment opportunities for women, we note that we have reviewed WZAK's employment submissions and do not find them in violation of our equal employment opportunity requirements. *See* 47 C.F.R. Section 73.2080. Finally, to the extent that Harris may be asking the Commission to investigate an individual complaint of employment discrimination, the Commission does not independently conduct such investigations. Rather, we have a formal Memorandum of Understanding with the Equal Employment Opportunity Commission (EEOC) regarding the exchange of information and the disposition of such complaints. *See Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC 2d 2320 (1978); 42 U.S.C. Section 2000(e); 29 C.F.R. Section 1601.13. In accordance with that Memorandum of Understanding, the Commission will act as a receiving agency for the EEOC in this matter and will refer the relevant portions of Harris' pleading to the EEOC for investigation and resolution. The date of filing of the charge with the Commission is deemed the date of filing with the EEOC. The Commission takes cognizance of final determination of agencies and courts in matters involving broadcast licensees and, therefore, directs Zapis to notify the Commission of the EEOC's final determination on this matter.

CONCLUSION

13. Based on the foregoing, we find that the Petitioner does not make a *prima facie* case or otherwise raise a substantial and material question of fact requiring resolution in a hearing. We further find that the applicant herein is fully qualified and that grant of its renewal application serves the public interest, convenience and necessity.

14. Accordingly IT IS ORDERED that the Petition to Deny of Leodis Harris IS DENIED.

15. IT IS FURTHER ORDERED that the license renewal application of Zapis Communications Corporation for Station WZAK, Cleveland, Ohio IS GRANTED.

16. This action is taken pursuant to delegated authority. *See* 47 C.F.R. Sections 0.61(c) and 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads
Chief, Audio Services Division
Mass Media Bureau

[5] Harris also raises the fact that this Program Director was shot and injured outside of the WZAK studio. While this is an unfortunate occurrence, it appears unrelated to the public interest concerns we examine in the context of a renewal proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ADVANCED TELECOMMUNICATIONS CORPORATION, and ITS SUBSIDIARIES,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-352
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-90-353
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-354
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-355
WISCONSIN BELL, INC.,	File No. E-90-356
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-357
NORTHWESTERN BELL TELEPHONE COMPANY, and	File No. E-90-360
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-361
Defendants.	

ORDER

Adopted: June 8, 1992; Released: June 18, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Advanced Telecommunications Corporation (ATC) may be entitled to recover damages as a result of defendants'[1] alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that ATC presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

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[1] Northwestern Bell Telephone Company (NWB), Mountain States Telephone and Telegraph Company (MTN) and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. (U S West) is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaints, however, were filed prior to the consolidation. Accordingly, we shall refer to the carriers as they were named in the complaints.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] The complainants relied, as does ATC in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. ATC's damage claims rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. The defendants raise a number of challenges to the complainant's damage claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[9] The defendants argue in unison that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[10] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rate of return was below the authorized level.[11] Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. Some defendants contend that an award of damages based on the measure advocated by the complainant would result in the same consequences as the automatic refund rule found unlawful in *AT&T v. FCC*. [12]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which ATC may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with ATC in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainants suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that ATC's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding ATC's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute ATC's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

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regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[8] ATC also seeks interest on this amount. We note that NWB and MTN argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant proceedings will depend on the particular facts established by the parties.

[9] The issues and arguments raised by defendants in response to ATC's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[11] Additionally, some defendants contend that the relevant overall interstate rate of return is that of the holding company in the aggregate, not of each component operating company. *See e.g.*, MTN and NWB Answer at Par. 17; Michigan Bell Telephone Company Motion to Dismiss at 4. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See e.g.*, 5 FCC Rcd 146 and 148 (1990). We find that ruling equally applicable to the defendants in this proceeding.

[12] *See, e.g.*, NWB Answer at Para 17.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[13]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[13] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-308

In re Applications of

LINDA U. KULISKY	File No. BPH-901024MD
LYNDA F. HASKINS	File No. BPH-901025ME
GILFORD BROADCASTING COMPANY	File No. BPH-901025MF

For Construction Permit for
a New FM Station on Channel 245A
in Tavernier, Florida

Appearances

Robert W. Healy, Esq. on behalf of Linda U. Kulisky; *George L. Lyon, Jr. Esq.* and *Marjorie K. Conner, Esq.* on behalf of Lynda F. Haskins; *David Honig, Esq.* and *Ronda Robinson, Esq.* on behalf of Gilford Broadcasting Company and *Robert A. Zauner, Esq.* on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: June 12, 1992; Released: June 18, 1992

I. PRELIMINARY STATEMENT

1. The *Hearing Designation Order* ("*HDO*") in this proceeding was released on October 30, 1991 (DA 91-1304). The following issues were specified for hearing:

> a. If a final environmental impact statement is issued with respect to Gilford and Kulisky in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.[1]
>
> b. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> c. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

The *HDO* directed that the areas and populations which would receive FM service of 1mV/m or greater intensity, together with the availability of other primary aural services in such areas, be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any applicant.

2. A prehearing conference was held on January 8, 1992. Hearing sessions were held on March 17 and 18, 1992, at the conclusion of which the record in this proceeding was closed. Tr. 339.

II. FINDINGS OF FACT

Linda U. Kulisky

3. Mrs. Kulisky is an individual applicant. She proposes to serve as the general manager of the proposed station on a full-time basis (40 hours per week). Kulisky Ex. 2. She will have the ultimate responsibility for making all management level decisions. She will select the station's format and its personnel.

4. Since 1982, Ms. Kulisky has been a resident of Plantation Key, Florida. It appears that her residence is approximately three or four miles from Tavernier, within the service area of the proposed station. Kulisky Ex. 3, Att. 1; Tr. 134.

5. Ms. Kulisky's involvement in civic activities is as follows:

Dates	Activities and Responsibilities
1985-1987	Girl Scouts of Tropical Florida. Helping mother, then leader of a Daily Girl Scout Troop. Kulisky Exhibit 3 at 2. Ms. Kulisky's daughter was a member of the Troop during that period. Tr. 52. Ms. Kulisky was no longer involved as a Girl Scout leader after her daughter left the Troop. Tr. 53.
1986-1991	Plantation Key School, Tavernier, Florida. Ms. Kulisky performed various volunteer activities at the school which is attended by her daughter.
1991	Florida Keys Children's Shelter, Tavernier, Florida. Ms. Kulisky participated as a volunteer for the newsletter staff. Kulisky Ex. 3 at 3.
1990-1991	Mariner's Hospital, Tavernier, Florida. Ms. Kulisky served as a hostess for the Bougainvillaea Ball, a fundraiser for the hospital's capital equipment fund. During 1991, Ms. Kulisky helped in the drive to raise funds for the construction of a new hospital. Kulisky Ex. 3 at 3.

1988-1990	Cystic Fibrosis. Ms. Kulisky served as a volunteer for the Redbone Celebrity Fishing Tournament in Islamorda, Florida. Her activities included hostessing participants in the fishing tournament, answering questions, and serving breakfast. Kulisky Ex. 3 at 3.
1988-1991	St. James the Fisherman Episcopal Church. Ms. Kulisky has been on the Newsletter staff, editing at home on her own personal computer. She has volunteered in the children's Sunday School program. She has served as Corporate Secretary and Clerk of the Vestry since January, 1989. She is a member of the Altar Guild, and serves as an assistant and teacher in the Adult Christian Education Program within the parish. For one year, Ms. Kulisky was the Keys' news contributor to The Net, a publication serving the Southeast Florida Diocese of the Episcopal Church. Kulisky Ex. 3 at 3-4.

6. From 1968 to 1969, Ms. Kulisky worked in the Traffic/Continuity Department at KMOX-CBS Radio, St. Louis, Missouri. Later in 1969, and continuing until 1973, Ms. Kulisky served as Traffic Director at WICD-TV, Champaign, Illinois, and later became the secretary to the station manager there. During 1974 - 1976, Ms. Kulisky volunteered for public television station WTVP (TV), Peoria, Illinois, as a member of the fundraising TV Auction Cabinet as Publicity Chairperson. She chaired talent coordination and training. She consulted on media promotion and performed general "as needed" tasks. Kulisky Ex. 3. Also in 1975, Ms. Kulisky participated in the production of a live radio presentation of the "Auction Man" program at WWCT-TV, Peoria, Illinois.

7. Half of Ms. Kulisky's construction and operating funds will come from her husband, Mr. Kulisky. Tr. 109, 111. She considered no other potential sources of funds. Tr. 109. Mr. Kulisky has already advanced $2,000 to Ms. Kulisky for prosecution of the application. Tr. 109, 142. There is no written documentation of the terms under which Mr. Kulisky will provide a loan to Ms. Kulisky. Ms. Kulisky will repay the loan "when the station begins to make money." Tr. 143.

8. Mr. Kulisky has invested in five radio stations introduced to him by John Galanses. Tr. 60-63. In 1984, Mr. Kulisky was himself an applicant for a new FM station in Strasburg, Virginia, with Mr. Galanses as the consulting engineer on the application. Haskins Ex. 2; Tr. 65-66. That same year, Mr. Galanses also prepared the engineering for an FM application filed by Mr. Kulisky's son and daughter in law. Haskins Ex. 10; Tr. 113-114.

9. Mr. Galanses, who performed Ms. Kulisky's engineering, recommended Robert Healy, Esq., to Ms. Kulisky. Tr. 67, 77. Mr. Healy had previously represented Mr. Kulisky and Mr. Galanses in their respective and joint broadcast ventures, along with those of relatives of Mr. Kulisky. Haskins Exs. 4, 5, 7 and 8; Tr. 67-74, 90-91, 94-95.

10. Mr. Galanses recommended the use of the WFKZ-FM tower. Tr. 77. Mr. Galanses and Mr. Kulisky formerly owned WKFZ-FM. *Id.*

11. Ms. Kulisky prepared no business plan or budget. Tr. 99-100. The only information she relied on to determine construction and operating costs is a letter from Mr. Galanses. Haskins Ex. 9; Tr. 100. That letter contains Mr. Galanses' costs of constructing his St. Croix, Virgin Islands station. Tr. 102-103, 106.

12. Ms. Kulisky plans to retain Mr. Galanses to build the station. Tr. 97, 140-141. At her deposition, she stated that he is likely to be the first person she would call with any questions concerning station operations. Tr. 97.

13. Kulisky has proposed the use of auxiliary power at both the studio and transmitter sites to keep the proposed station in operation during times of commercial power outage. Kulisky Ex. 3. Ms. Kulisky has no interest in any medium of mass communications.

Lynda F. Haskins

14. Mrs. Haskins is an individual applicant. Haskins Ex. 1. She proposes to work full-time at the station (at least 40 hours a week) as general manager. She will have ultimate responsibility for all management, administrative, programming, employment, and budgeting decisions, and she will supervise all aspects of day-to-day operation of the proposed station.

15. Mrs. Haskins resides in Awendaw, South Carolina. She also claims that she has "resided part-time in Islamorada, Florida, and [has] owned a home in that community since 1988." She proposes future local residency in Tavernier. Haskins Ex. 1. Mrs. Haskins is a member of the Islamorada Fishing Club. Haskins Ex. 1. However, she does not participate in any of the club civic functions. Tr. 188. Her participation consists solely of fishing, for which she pays $100.00 a year in membership dues. Tr. 189-190.

16. Ms. Haskins' communications law firm identified the engineers, and Ms. Haskins considered no other engineers. Tr. 204. The engineers arranged for the transmitter site, and Ms. Haskins did not speak with the site owner until the engineers had already made those arrangements. Tr. 205. The law firm prepared the programming statement Tr. 210; it prepared the integration statement Tr. 210; it wrote the check for the application fee. Tr. 210-211; it published the Notice of Filing of the application. Tr. 211; it published the Notice of Designation for Hearing. Tr. 211; and it set up the public file, which Ms. Haskins had never seen at the time of her deposition even though it is maintained only a couple of blocks from her home. Tr. 211-212. The law firm, together with the engineers, prepared Ms. Haskins' budget; she did nothing to independently verify its cost estimates. Gilford Ex. 9; Tr. 212-213. She does not know who will supervise construction of the station. Tr. 193-194. She does not know how many office personnel she will employ, or whether the office personnel will be fulltime or parttime. Tr. 214-216.

17. Ms. Haskins has no attributable interest in any medium of mass communications. Haskins Ex. 1 at 1.

18. Haskins proposes auxiliary power at the studio and transmitter sites. Haskins Ex. 1 at 2.

Gilford Broadcasting Company

19. Gilford is a Florida corporation whose sole stockholder, officer and director is Ms. Vera Gilford. Neither Gilford Broadcasting or Vera Gilford has any interest

in any medium of mass communications. Gilford Ex. 2. Ms. Gilford resides in Miami, Florida, outside the service area of the proposed station. If Gilford Broadcasting is awarded the construction permit, Ms. Gilford will move to Tavernier to construct and operate the station. She will hold the position of General Manager on a full-time basis (at least 40 hours per week). As the general manager, she will be ultimately responsible for all management, administrative, programming, employment and budgeting decisions. Gilford Ex. 3.

20. Ms. Gilford is self employed as the owner of Pete's Fountain and Bar, Inc., in Miami. Gilford Ex. 3. In addition to herself, Pete's employs two persons full-time and four persons part-time. Since filing the application, Ms. Gilford has devoted approximately 30 hours per week to Pete's. Ms. Gilford's sister, Velma Eason, has been the general manager of Pete's since December 1989. Ms. Eason has agreed to assume full responsibility for the day-to-day operation of Pete's, if Gilford obtains the construction permit. Ms. Gilford's time as an absentee owner would be devoted primarily to handling monthly accounting and tax reports, activities which require no more than approximately five hours per month.

21. Since January 1989, Ms. Gilford has also been self-employed as an attorney, specializing in tax and entertainment law. Since filing the application, Ms. Gilford has intended to close down her now much reduced law practice by the time program test authority is received. If Ms. Gilford has any other employment at the time Gilford might receive the permit, she will resign that employment upon the issuance of the permit.

22. Kulisky Ex. 6, a September 24, 1990 letter to counsel for Gilford, indicates that at that time Ms. Gilford was considering either building a station using "On Air Staff," or using an automated station. Tr. 292-3, 295. In this latter regard, Gilford testified that "the automation was not considered 100 percent automation," and as the station's general manager she intended to work on-site "at least 40 hours a week." Tr. 295. Furthermore, Gilford's financial plan states that the facility "will provide daily public service announcements to serve the informational needs of the public." Kulisky Ex. 8.

23. On or about October 11, 1990, Gilford's engineer sent Ms. Gilford a listing of "Equipment Necessary for Satellite Fed FM Broadcast Station." Kulisky Ex. 7. The list contained prices for equipment and for installation. Ms. Gilford testified that she relied on this document in estimating the construction costs of her proposed station. Tr. 299. Ms. Gilford was unable to identify any item in the list of equipment which could be used by the station for local program origination. Tr. 301.

24. On October 17, 1990, Ms. Gilford submitted a loan request to the CVC Capital Corp. Kulisky Ex. 8. That loan request detailed Gilford's business plan for the construction and operation of the proposed station. The business plan contained no explicit estimate of any cost of constructing a studio, remodeling an existing building for a studio, or leasing studio space. However, Gilford's budget does include a $3,500 line item for a transmitter building as well as separate line items for power to the studio and power to the transmitter. In her testimony at hearing, Ms. Gilford stated that she had contemplated "combining the office right in the studio." Tr. 292. Although Ms. Gilford was unable at the hearing to identify any item in the listing of equipment received from her engineer which related to local program origination, her budget nevertheless identified a studio/production equipment cost figure of $33,050. Kulisky Ex. 8.

25. Ms. Gilford is a black female. Since April 1988, she has been a member of Friends of Graham, a statewide support and advisory group established by Senator Bob Graham to keep him informed of various issues affecting South Florida. From April 1989 until September of that year, Ms. Gilford was a member of the Corporate Campaign Committee, Historical Museum of South Florida, Miami. From July 1990 to October 1990, she was a member of the Governor's Responsible Vendor Advisory Committee, an entity engaged in encouraging liquor vendors to reduce the risk of drinking and driving. Since September 1990, Ms. Gilford has been a member of the Florida State Branches of the NAACP.

26. From January 1989 to the present time, Ms. Gilford has performed some work as an attorney specializing in entertainment law. Gilford Ex. 3. Ms. Gilford's law practice involved her in drafting contracts for entertainers; obtaining copyrights and handling issues of copyright violations; handling employment tax matters; assisting with road tours; assisting in developing computerized programs needed to keep track of revenues; and counseling on the purchase of a recording studio.

27. Gilford proposes to install auxiliary power at both the studio and transmitter sites. Gilford Ex. 2.

Comparative Coverage

28. The total area and population within each applicant's proposed 1 mV/m contour is as follows:

Total Areas and Populations Served

Applicant	Area (Sq. Km.)	Population
Kulisky	132	14,154
Haskins	308	15,653
Gilford	293	14,292

29. The entire area to be served by the applicants is currently served by five or more aural stations. Thus, none of the applicants will provide service to an underserved area. Joint Ex. 1.

III. CONCLUSIONS OF LAW

Linda U. Kulisky

30. Linda Kulisky is an individual applicant who proposes full-time integration into the management of the station. In preparing and prosecuting her application, Ms. Kulisky relied heavily on her engineer and her legal counsel, and she has a spouse who agreed to lend her some money. Nothing in this record, however, suggests that anyone but Ms. Kulisky is and will be in control of her station. *Oliver Kelley and Mary Ann Kelley*, 6 FCC Rcd. 7377, 7379-80 (Rev. Bd. 1991). Linda Kulisky receives 100% quantitative integration credit.

31. Ms. Kulisky has been a resident of the proposed service area since 1982 and has participated in a number of civic activities there. These attributes enhance the integration proposal to a moderate degree. Slight enhance-

ment credit is awarded for Ms. Kulisky's broadcast experience, and very slight enhancement is awarded for the proposal to utilize auxiliary power.

Lynda F. Haskins

32. Lynda Haskins is an individual applicant who proposes full-time integration into the management of the Tavernier station. The record reflects nearly total reliance by Ms. Haskins on her attorneys for the preparation and prosecution of her application. Even so, there is no evidence in the record to support a conclusion that Ms. Haskins is not a legitimate applicant proposing full-time integration into the management of the station. Haskins receives 100% quantitative integration credit.

33. In proposed findings, counsel for Haskins asserts that Ms. Haskins has "lived part-time in the community of Tavernier since 1988," suggesting that Tavernier and Islamorada are one and the same. Even if that is the case, however, Ms. Haskins can receive no residency/civic participation credit. It is simply not possible to confidently award any degree of enhancement credit for the exceedingly vague and unspecific claim of "part-time" residence.

34. Ms. Haskins will receive a very slight enhancement of her integration proposal for her promise to utilize auxiliary power, and a slight enhancement for her promise of future service area residency.

Gilford Broadcasting Company

35. Gilford Broadcasting Company's sole stockholder is Ms. Vera Gilford. Ms. Gilford proposes to be the full-time general manager of the Tavernier facility if Gilford Broadcasting Company receives the construction permit. Ms. Gilford is presently a resident of Miami, Florida. She will relocate to Tavernier to carry out her integration commitment.

36. According to Ms. Haskins, "Gilford proposes a fully automated facility for Tavernier." Since such a facility would not require Ms. Gilford to put her knowledge of the community to use in programming in response to community needs, Haskins argues that Gilford can receive no integration credit. Ms. Kulisky makes essentially the same argument, contending that "an applicant who plans to build a satellite fed station providing no news or other informational programming is entitled to either [no] or substantially reduced enhancement credit."

37. The claim that Gilford proposes a fully automated facility is contradicted by Ms. Gilford's hearing testimony that "the automation is not considered 100% automation." Also, according to Gilford's financial plan, the facility "will provide daily public service announcements to serve the informational needs of the public." In addition, Ms. Gilford's testimony was that the station will employ personnel who will produce local programming, including Public service announcements. Tr. 311, 313-14, 329. One of these persons will also have sales and announcing responsibilities. Kulisky Ex. 8. Ms. Gilford's own duties as the station's general manager contemplate that she "acts as community liaison," and "adapts the studio for programming needs." *Id.* It thus appears that while the station will have some automation, it is not to be a "fully automated facility." Haskins' and Kulisky's claims to the contrary do not defeat Ms. Gilford's expressed intention to work at the station "at least 40 hours a week."

38. Ms. Gilford's plan to become an absentee owner of Pete's Fountain and Bar, Inc., and the scaling back of her law practice, plus Ms. Gilford's commitment to forego other employment if Gilford Broadcasting is successful here, persuade the presiding officer that Ms. Gilford will be able to effectuate her integration proposal. Gilford receives 100% quantitative integration credit.

39. That integration credit is substantially enhanced by virtue of Ms. Gilford's status as a minority group member. Ms. Gilford is not shown to have resided either in Tavernier or within the proposed service area. Consequently, Gilford Broadcasting Company is not entitled to residency/civic participation enhancement credit. Gilford Broadcasting does receive a slight qualitative enhancement of its integration proposal for Ms. Gilford's promise of future local residency, and a very slight enhancement for the proposal to utilize auxiliary power.

40. Gilford Broadcasting Company seeks enhancement credit for broadcast experience of Vera Gilford, saying that her experience is "readily transferable to broadcasting." Specifically, Gilford relies on Ms. Gilford's law practice which involved drafting contracts for entertainers; obtaining copyrights and handling issues of copyright violations; handling tax matters; assisting with road tours; assisting in developing computerized programs needs to keep track of revenues; and counseling on the purchase of a recording studio. Gilford may be correct in its assertion that this experience is "readily transferable to broadcasting" but, in the presiding officer's view, it does not constitute "broadcast experience" for which enhancement credit will be given. Gilford Broadcasting Company receives no enhancement for broadcast experience.

Comparative Coverage

41. Where the areas and populations within the applicants' proposed coverage areas are already well-served, the Commission has awarded a slight coverage preference only to those applicants proposing substantially greater overall coverage than their competitors. *See, Simon Geller*, 90 FCC 2d 250, 268-79, 276 (1982), where a slight preference was awarded to an applicant proposing to serve four times more area and 315,000 more people than its competitor. For less significant differences, a very slight preference has been awarded. *See, e.g., Barton Broadcasting Co.*, 104 FCC 2d 785, 791 (rev. Bd. 1986), where a very slight preference was awarded to an applicant proposing to serve 44,215 or 27% more people. Where the differences are insignificant, no preference is awarded. *See, e.g., Susan Mulkey*, 4 FCC Rcd 5520, 5521 (1989), where no preference was awarded to an applicant proposing to serve 36,206 or 2% more people.

42. Here, although Haskins and Gilford will serve substantially more area than Kulisky, the three applicants will serve almost identical populations (the difference between the largest and smallest proposals is less than 1,500 persons). Given the closeness in populations each of the applicants would serve, it is concluded that none of the applicants should receive a preference under the areas and populations aspect of the standard comparative issue.

IV. ULTIMATE CONCLUSIONS

43. Each of the three applicants receives 100% quantitative integration credit and none is charged with a diversification demerit; each of them proposes the use of auxiliary power, and none of them receives a coverage preference. The case is therefore to be decided on the basis of the remaining qualitative attributes of the applicants.

44. Haskins has but a single slight enhancement for her promise of future local residence. She thus places last in this ranking.

45. The Commission has held that minority ownership and local residence (now including civic participation) have equal significance in choosing the comparatively superior applicant. *Radio Jonesboro, Inc.*, 100 FCC 2d 941 (1985). Residency in the community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). In the instant case, then, the 100% minority enhancement awarded Gilford has more significance than the 100% service area preference accorded Kulisky. Although residence in the community of license is equal in weight to minority ownership, Kulisky is here credited only with residence in the service area, generally of lesser weight. Kulisky's slight enhancement for broadcast experience, and Gilford's slight enhancement for a promise of future local residence, cancel one another leaving Gilford the preferred applicant herein.

Accordingly, IT IS ORDERED THAT unless An Appeal from this Initial Decision is taken by a party, or IT IS REVIEWED By the Commission on its own motion, the Application of Gilford Broadcasting Company (File No. BPH-901025MF) IS GRANTED and the Applications of Linda U. Kulisky (File No. BPH-901024MD) and Lynda F. Haskins (File No. BPH-901025ME) ARE DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] The environmental issue was earlier resolved in favor of Gilford. Tr. 17. By letter dated February 20, 1992, the Chief, Audio Services Division, informed the presiding officer that Kulisky had submitted satisfactory environmental information which ought to result in the elimination of the contingent environmental issue as to that applicant. Accordingly, the contingent environmental issue is deleted.

[2] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-55

In the Matter of

Amendment of Section 73.202(b), RM-7939
Table of Allotments,
FM Broadcast Stations.
(Quincy, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 3, 1992; Released: June 19, 1992

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 2097 (1992), issued in response to a petition for rule making filed on behalf of John K. LaRue ("petitioner"), permittee of Station KSPY(FM), Channel 262A, Quincy, California, proposing the substitution of Channel 262C3 for Channel 262A and modification of his construction permit accordingly. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by substituting Channel 262C3 for Channel 262A at Quincy, since it could provide an enhanced service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will substitute Channel 262C3 for Channel 262A and modify the permit of John K. LaRue for Station KSPY(FM), as requested. Channel 262C3 can be allotted to Quincy at the petitioner's suggested site,[1] in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 3, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Quincy, California	240A, 262C3, 271A[2]

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of John K. LaRue (BPH-890313MR) for Station KSPY(FM), IS MODIFIED to specify operation on Channel 262C3 in lieu of Channel 262A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted**, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, John K. LaRue, permittee of Station KSPY(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade at Quincy, California.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

[1] Coordinates for Channel 262C3 at Quincy are 40-02-41 and 120-53-04.

[2] Channel 271A was substituted for Channel 271C2 at Quincy in MM Docket No. 92-20. *See* 7 FCC Rcd _____ (adopted May 12, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-127

In the Matter of

Amendment of Section 73.202(b),	RM-7445 RM-6577
Table of Allotments,	RM-7537 RM-7346
FM Broadcast Stations.	RM-7711 RM-7375
(Blackville, Branchville, Edisto Beach, Estill, Georgetown, Kiawah Island, Moncks Corner and Walterboro, South Carolina, and Richmond Hill, Georgia)[1]	RM-7762

FIRST REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 28, 1992; Released: June 19, 1992

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 2243 (1991), issued in response to five mutually exclusive or interrelated petitions for rule making. Comments were sought on the requests of (1) Cedar Carolina Limited Partnership ("Cedar"), licensee of Station WJYQ(FM),[2] to substitute Channel 287C2 for Channel 288A at Moncks Corner, South Carolina, modify Station WJYQ(FM)'s license to specify operation on the higher class channel, substitute Channel 229A for Channel 287A at Walterboro, South Carolina, and modify Station WONO's construction permit accordingly,[3] (2) Eutaw Broadcast Associates ("Eutaw") to allot Channel 286A to Branchville, South Carolina, by substituting Channel 249A for Channel 287A at Walterboro, South Carolina, (3) Williams Communications ("Williams") to allot Channel 250C3 to Estill, South Carolina, and substitute Channel 239A for unoccupied but applied for Channel 250A at Blackville, South Carolina, (4) Jerry Rogers, d/b/a Richmond Hill Broadcasting ("RHB") to substitute Channel 287C3 for Channel 287A at Richmond Hill, Georgia, modify Station WRHQ's construction permit to specify operation on the higher class channel, and substitute Channel 249A for Channel 287A at Walterboro, and (5) Coastline Communications of Carolina, Inc. ("Coastline") to substitute Channel 249C1 for Channel 249C2 at Georgetown, South Carolina, and modify Station WBPR's license to specify the higher class channel. Thus, the Commission optionally proposed (1) the allotment of Channel 287C2 to Moncks Corner and Channel 249A to Walterboro, or (2) the allotment of Channel 249C1 to Georgetown, Channel 250C3 to Estill and Channel 239A to Blackville or (3) the allotment of Channel 287C3 to Richmond Hill, Channel 286A to Branchville and Channel 249A to Walterboro.[4] Comments were filed by Eutaw, Dyer Radio Company ("Dyer"), Williams[5] and Coastline. In addition, counterproposals were filed by Cedar, Thoroughbred Communications, Inc. ("TCI"),[6] and jointly by Toni T. Rinehart ("Rinehart") and TBJ Broadcasting Partnership ("TBJ").[7] Reply comments were filed by Cedar, Oristo Communications ("Oristo") and TCI.[8]

2. Almost simultaneously with the adoption of the *Notice* in this proceeding, the Commission received Rinehart's request to allot Channel 229A to Edisto Beach, as the community's first local FM service.[9] The allotment of Channel 229A to Edisto Beach is short-spaced to the proposed allotment of Channel 229A to Walterboro, as requested by Cedar, since the communities are located only 52 kilometers apart and the Commission's rules stipulate a minimum distance separation of 115 kilometers between co-channel Class A allotments. However, because the *Notice* herein had proposed only the substitution of Channel 249A for Channel 287A at Walterboro,[10] as requested by

[1] The communities of Edisto Beach and Kiawah Island, South Carolina, have been added to the caption.

[2] On August 9, 1991, the Commission granted Cedar's application to assign Station WJYQ(FM)'s license to Sonnydale Broadcasting, Inc. (BALH-910621HG), but the assignment has not yet been consummated. However, Sonnydale states its intention to honor the commitments made by Cedar.

[3] Instead of proposing the allotment of Channel 229A to Walterboro, the *Notice* proposed Channel 249A since it could be used at the site specified in Station WONO's construction permit. An *Order to Show Cause* to Station WONO is not necessary since the construction permit is conditioned on the outcome of this proceeding.

[4] This *First Report and Order* concerns only the allotments at Blackville, Branchville, Edisto Beach and Estill, South Carolina, and Richmond Hill, Georgia. The remaining proposals will be the subject of a *Second Report and Order*.

[5] After the record closed, Williams withdrew its comments supporting the allotment of Channel 250C3 to Estill and no other party expressed an intention to apply for the channel, if allotted. Therefore, the comments and responses relating to the Estill and Blackville allotments will not be discussed and the proposal will be dismissed. Pursuant to Section 1.420(j) of the Commission's rules, Williams states that no consideration was received in exchange for the withdrawal of interest. Accordingly, Williams' proposal to allot Channel 250C3 to Estill will be dismissed.

[6] On March 22, 1991, the Commission granted the application of RHB to assign Station WRHQ(FM)'s construction permit to TCI (BAPR-910131HG). RHB will hereafter be referred to as TCI.

[7] Public Notice of the counterproposals was given on July 19, 1991, Report No. 1853.

[8] The following unauthorized pleadings pertaining to the Edisto Beach and Estill allotments were filed after the record closed: (1) Motions to Strike Comments of Oristo Communications filed by TCI and TBJ and Opposition to Motion to Strike filed by Oristo; (2) Motion for Leave to File and Motion to Dismiss comments of Williams, Dyer and Oristo filed by Eutaw and Oppositions to Motion to Dismiss filed by Williams, Dyer and Oristo. The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment periods set forth in the *Notice*. Therefore, they will not be considered.

[9] The *Notice of Proposed Rule Making* was adopted on April 17, 1991, and Rinehart's Edisto Beach petition was filed with the Commission on April 16, 1991.

[10] The *Notice* only proposed Channel 249A as a substitute channel at Walterboro because the channel could be allotted at

Eutaw, and did not alternatively propose Channel 229A at Walterboro, the staff deviated from its usual practice of accepting Rinehart's request as a counterproposal in this proceeding. Instead, since there was no technical conflict between Channel 249A at Walterboro and Channel 229A at Edisto Beach, we sought comments on the Edisto Beach allotment in a separate *Notice of Proposed Rule Making*.[11]

3. In comments filed June 17, 1991, in this proceeding, Cedar pointed out that Channel 229A should also have been proposed as a substitute for Channel 287A at Walterboro, as requested in its petition, and should remain a viable proposal because the petition contained the written consent of Station WONO to both the channel change and the required change in its transmitter site. As a result, the Commission adopted an *Order Withdrawing Notice of Proposed Rule Making* on June 19, 1991, stating that the Edisto Beach proposal would be considered as a counterproposal herein.[12] On June 28, 1991, Rinehart filed comments in both this proceeding and the Edisto Beach proceeding (MM Docket 91-148) withdrawing her expression of interest in Channel 229A at Edisto Beach. However, copies of these pleadings were not received by the staff before the Edisto Beach proposal was put out on public notice as a counterproposal in this proceeding and comments solicited on its merits. Had Rinehart's withdrawal been timely received by the staff, no further consideration of the proposal would have been given. The Commission has stated that the purpose of placing counterproposals on Public Notice is not to solicit additional expressions of interest but only to seek comments on the merits of the proposal. *See Carolina Beach, North Carolina, et al.*, 7 FCC Rcd 544, n.10 (1992). Thus, since there was no longer a timely filed expression of interest in the Edisto Beach allotment, no purpose would have been served by seeking comments on the merits of the proposal. We believe that Oristo has not been deprived of an opportunity to express an interest in an allotment at Edisto Beach. Oristo could have filed a petition for Channel 229A at Edisto Beach at any time prior to June 17, 1992, when comments and counterproposals to the Moncks Corner/Walterboro proposal were due. Oristo, however, did not express an interest in an Edisto Beach allotment until July 2, 1992, in response to the Public Notice announcing Rinehart's proposal. Therefore, we will grant Rinehart's request to withdraw her Edisto Beach proposal.

4. In reviewing the remaining proposals before us, we find that the withdrawal of the proposed allotment of Channel 250C3 at Estill permits the following optional allotment plans:

OPTION I

	Channel No.	
City	Present	Proposed
Edisto Beach, South Carolina	--	229A
Walterboro, South Carolina	265C3, 287A	249A, 265C3
Moncks Corner, South Carolina	288A	287C3
Branchville, South Carolina	--	286A
Richmond Hill, Georgia	287A	287C3

OPTION II

Edisto Beach, South Carolina	--	229A
Walterboro, South Carolina	265C3, 287A	249A, 265C3
Kiawah Island, South Carolina	--	288C2
Branchville, South Carolina	--	286A
Richmond Hill, Georgia	287A	287C3

OPTION III

Walterboro, South Carolina	265C3, 287A	229A, 265C3
Moncks Corner, South Carolina	288A	287C3
Georgetown, South Carolina	229A, 249C2, 293C2	229A, 249C1, 293C2
Branchville, South Carolina	--	286A
Richmond Hill, Georgia	287A	287C3

OPTION IV

Walterboro, South Carolina	265C3, 287A	229A, 265C3
Kiawah Island, South Carolina	--	288C2
Georgetown, South Carolina	229A, 249C2, 293C2	229A, 249C1, 293C2
Branchville, South Carolina	--	286A
Richmond Hill, Georgia	287A	287C3

5. We find that Channel 286A can be allotted to Branchville, regardless of which allotment plan is

the transmitter site specified in Station WONO's outstanding construction permit. The use of Channel 229A at Walterboro requires that Station WONO relocate its transmitter site.

[11] *See* 6 FCC Rcd 3290 (1991).

[12] Public Notice of the Edisto Beach counterproposal was given on July 19, 1991, Report No. 1853.

adopted.[13] Further, since the Branchville allotment will not only provide the community with its first local aural transmission service but also serve the allotment priority of providing a second nighttime aural service to over 4,000 persons,[14] we believe that the public interest would be served by granting this proposal at this time. We will also substitute Channel 229A for Channel 287A at Walterboro and modify the construction permit of Station WONO accordingly. With the dismissal of Rinehart's Edisto Beach proposal and the deletion of Channel 287A at Branchville, Channel 287C3 can be allotted to Richmond Hill regardless of which of the remaining proposals are ultimately adopted. Therefore, we believe that the public interest would also be served by granting the Richmond Hill proposal at this time.

6. Rinehart and Dyer each filed comments expressing an intention to apply for Channel 286A, if allotted to Branchville. Dyer describes Branchville as an incorporated community with a 1990 U.S. Census population of 1,170 persons. Branchville, governed by a mayor and town council, has its own police and fire departments, rescue squad, churches, and local schools. TCI reiterates its intention to apply for Channel 287C3, if allotted to Richmond Hill. It states that the allotment of a Class C3 to the community will enable Station WRHQ(FM) to provide a new aural service to 34,377 persons.

7. Channel 286A can be allotted to Branchville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. Channel 229A can be allotted to Walterboro in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.2 kilometers (6.3 miles) east. Channel 287C3 can be allotted to Richmond Hill with a site restriction of 19.3 kilometers (12 miles) northeast to avoid short-spacings to the allotment and construction permit coordinates of Station WHVL, Channel 284A, Hinesville, Georgia, to two pending applications for Channel 287A at Fernandina Beach, Florida, and to Station WIFO-FM, Jesup, Georgia.[15]

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 3, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Richmond Hill, Georgia	287C3
Branchville, South Carolina	286A
Walterboro, South Carolina	229A, 265C3

9. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Thoroughbred Communications, Inc., for Station WRHQ(FM), Richmond Hill, Georgia, IS MODIFIED to specify operation on Channel 287C3, in lieu of Channel 287A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of TBJ Broadcasting Partnership for Station WONO, Walterboro, South Carolina, IS MODIFIED to specify operation on Channel 229A in lieu of Channel 287A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WONO's construction permit, BPH-880601ND, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit BPH-880601ND, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

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[13] We recognize that these allotment plans do not provide for the allotment of Channel 287C2 to Moncks Corner, as originally requested by Cedar. Channel 287C2 at Moncks Corner conflicts with both the allotment of Channel 286A to Branchville and the substitution of Channel 287C3 for Channel 287A at Richmond Hill. However, Cedar has itself counterproposed the allotment of Channel 288C2 to Kiawah Island, or in the alternative, agreed to the substitution of Channel 287C3 for Channel 288A at Moncks Corner. Further, were we to compare the Moncks Corner Class C2 proposal and the allotment of Channel 286A at Branchville, we would favor the Branchville proposal since it would not only provide the community with its first local aural transmission service but also provide a second nighttime aural service to 4,189 persons within a 139.9 square mile area. *See Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88 (1982), and *Benton, Arkansas,* 2 FCC Rcd 1963 (1987).

[14] The allotment priorities are: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local aural service; and (4) Other public interest matters. Priorities (2) and (3) are given co-equal weight. *See Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88 (1982).

[15] The coordinates for Channel 287C3 at Richmond Hill, Georgia, are North Latitude 31-59-42 and West Longitude 81-06-40. The coordinates for Channel 286A at Branchville are 33-15-06; 80-49-00. The coordinates for Channel 229A at Walterboro are 32-55-00; 80-33-00.

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Thoroughbred Communications, Inc., permittee of Station WRHQ(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

12. IT IS FURTHER ORDERED, that the petition of Williams Communications (RM-7375) to allot Channel 250C3 to Estill, South Carolina, by substituting Channel 239A for Channel 250A at Blackville, South Carolina, and the request of Toni T. Rinehart (RM-7711) to allot Channel 229A to Edisto Beach, South Carolina, ARE DISMISSED.

13. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee, as follows: TBJ Broadcasting Partnership, Station WONO, P.O. Box 215, Walterboro, South Carolina 29488.

14. The window period for filing applications for Channel 286A to Branchville, South Carolina, will open on **August 4, 1992**, and close on **September 3, 1992.**

15. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-473

In the Matter of

Amendment of Section 73.202(b), RM-6388
Table of Allotments,
FM Broadcast Stations.
(Prescott Valley, Arizona)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 10, 1992; Released: June 19, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it petitions for reconsideration of the *Report and Order* ("*R&O*") in this proceeding, 6 FCC Rcd 2037 (1991), filed by Southwest FM Broadcasting Co., Inc. ("Southwest"), licensee of Station KAHM(FM), Channel 271C, Prescott, Arizona, and by Payne-Prescott Broadcasting Co., Inc. ("Payne-Prescott"), licensee of Station KNOT-FM, Prescott, Arizona.[1] The *R&O* allotted Channel 252C2 to Prescott Valley, Arizona as its second local FM service. Oasis International Communications ("Oasis"), an applicant for Channel 252C2 at Prescott Valley, filed an opposition to the petitions for reconsideration, and Payne-Prescott filed a partial reply to that opposition. For the reasons discussed below, we herein dismiss Payne-Prescott's petition as moot[2] and deny Southwest's petition.

BACKGROUND

2. In response to a petition for rule making filed by Lucky Communications, Inc. ("Lucky"),[3] the Commission proposed to allot Channel 252C2 to Prescott Valley, Arizona. While the *Notice* recognized that the proposal would create a short-spacing to the licensed facilities of Station KNOT-FM, Channel 252A, Prescott, Arizona, it noted that the required separation between Class A to Class C2 co-channels is met because Station KNOT-FM is moving from Channel 252A to Channel 256C pursuant to MM Docket No. 84-512. Station KNOT-FM was then served with a copy of the *Notice* and did not file either comments or reply comments.

3. In the *R&O* in this proceeding, we allotted Channel 252C2 to Prescott Valley, Arizona, since this would provide a second local FM service to the community. We also found that this allotment complied with the minimum distance separation requirements of the Commission's Rules. Specifically, we stated that since the FM Table of Allotments was amended effective May 7, 1986, to reflect Channel 256C in lieu of Channel 252A at Prescott, Station KNOT-FM was no longer entitled to protection for Channel 252A under relevant Commission case law.[4] We further noted that Payne-Prescott had filed an application (File No. BPH-860709IC) for Station KNOT-FM to upgrade its facilities on Channel 256C at Prescott.

THE PLEADINGS

4. *Payne-Prescott's Petition.* In its petition, Payne-Prescott alleges that the allotment of Channel 252C2 to Prescott Valley will cause interference to its current operations on Channel 252A at Prescott. In its petition for reconsideration, Payne-Prescott concedes that it did, indeed, file an application to operate on Channel 256C in 1986, specifying a new antenna site. Payne-Prescott adds that the FM Branch asked it to amend its application several times over the course of the next two years. Ultimately, the FM Branch dismissed the application because Payne-Prescott had failed to respond to a further request for information within the time period specified. Payne-Prescott states that it submitted a petition for reconsideration of this dismissal on March 1, 1989, and is still awaiting a final decision in that matter.

5. Payne-Prescott further contends that there is "little immediate prospect" that its application will be granted because the FAA had determined that the chosen antenna site constitutes a hazard to air navigation due to interference with FAA communications equipment in a nearby community. Payne-Prescott adds that it is considering filing a request with the Commission to return KNOT-FM to licensed operations on Channel 252A. Under these circumstances, Payne-Prescott believes that station KNOT-FM is entitled to protection of its licensed facilities on Channel 252A at Prescott.

6. In its opposition to Payne-Prescott's petition, Oasis contends that Payne-Prescott is not entitled to the protection it seeks on Channel 252A because its license was modified to specify operation on Channel 256C, effective May 7, 1986, and because it applied for authority to operate on that channel. Oasis cites *Plainview, Texas*,[5] as supportive of this assertion and argues that the Commission should require Payne-Prescott to move to the channel for which it applied. Furthermore, contrary to Payne-Prescott's claim that the FAA will not approve Payne-Prescott's proposed transmitter site, Oasis notes that the FAA letter relied upon by Payne-Prescott also states that the site would be acceptable providing the sponsor gives

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[1] Public notice of the petitions was given in Report No. 1846, May 28, 1991.

[2] Payne-Prescott also filed a motion requesting the Commission to stay the effective date of the *R&O* in this proceeding and the opening of the filing window for Channel 252C2 at Prescott Valley. Oasis filed an opposition to that petition, and Payne-Prescott filed a motion to strike Oasis' opposition. Since we are dismissing Payne-Prescott's petition for reconsideration herein, its motion for stay will also be dismissed as moot.

[3] Lucky was the licensee of Station KLKY(AM), Prescott Valley, Arizona, and was granted Commission approval on April 29, 1991, to assign the station to Oasis (File No. BAL-910319EA).

[4] *See Plainview, TX*, 4 FCC Rcd 8788 (1989).

[5] *See* 4 FCC Rcd 8788 (Allocations Branch 1989).

assurance that spurious radiation would be below -104 dBm measured at the FAA site. Oasis charges that Payne-Prescott may give such assurances, as well as satisfy FCC standards governing RF radiation, by installing a properly engineered antenna system and transmission equipment.

7. Oasis also contends that, although Payne-Prescott may elect, or be compelled by circumstance, to abandon its plans to upgrade on Channel 256C, it still can take alternate steps which would enable it to continue operations "without inhibiting the allocation of a new FM channel to Prescott Valley." Such steps include the voluntary downgrade of Station KNOT-FM to a lower class channel such as Channel 256C1, or voluntarily relinquishing its reservation of Channel 256C at Prescott and filing an application for a construction permit to operate on Channel 252C2 at Prescott Valley.

8. *Southwest's Petition.* In its petition, Southwest alleges that Lucky, the original proponent of the Prescott Valley allotment, is the subject of a bankruptcy proceeding and has filed an application to assign Station KLKY(AM) to another party. On this ground, Southwest contends that it is unlikely that the statement of continuing interest submitted by Lucky, two and one-half years ago in response to the *Notice of Proposed Rule Making* in that proceeding, is still valid. Southwest states that the bankruptcy proceeding makes Lucky's statement of continuing interest "completely unrealistic," and further states that it does not believe the Commission would have allotted Channel 252C2 to Prescott Valley had it been aware of the changed circumstances prior to adoption of the *R&O*.[6]

9. In its opposition to Southwest's petition for reconsideration, Oasis states that it is the successor-in-interest to Lucky's AM Station KLKY. Oasis states that, as such, it fully intends to seek a license to operate on Channel 252C2, if allotted. Oasis adds that Southwest has produced no evidence to indicate otherwise or to support its suggestion that a proposed assignment by an allotment proponent somehow invalidates its initial expression of interest, thereby warranting termination of the proceeding when no other expressions have been filed. Oasis further stresses that the Commission does not judge a proponent in allotment proceedings on its financial qualifications. Rather, Oasis asserts, questions of financial fitness will be evaluated when the proponent files an application to operate on the channel once it has been allotted.

DISCUSSION

10. *Payne-Prescott's Petition.* We will dismiss Payne-Prescott's petition because the arguments raised therein have become moot. Specifically, subsequent to the filing of its petition for reconsideration in this proceeding, Payne-Prescott filed an application for a construction permit (BPH-910903IB) to operate on Channel 256A at Prescott, Arizona, which was granted on December 20, 1991. Under Section 73.3573(a)(1) of the Commission's Rules, the effect of this grant was to downgrade Channel 256C at Prescott to Channel 256A. *See Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment,* 4 FCC Rcd 2413 (1989). Since Channel 256C at Prescott has now been downgraded to Channel 256A and since Station KNOT-FM has been granted authority to move its operations from Channel 252A at Prescott to Channel 256A, its arguments that it should be able to continue operations on Channel 252A have become moot. Accordingly, Payne-Prescott's petition will be dismissed.

11. *Southwest's Petition.* We also deny Southwest's petition for reconsideration. Although Southwest questions the validity of Lucky's expression of interest in the Prescott Valley allotment in view of its subsequent filing for reorganization under Chapter 11 of the United States Bankruptcy Code, this does not affect the validity of the allotment. First, Lucky filed a timely expression of interest in the Prescott Valley allotment, and no evidence has been submitted to show that Lucky's expression of interest was not valid when filed. Second, two other entities have submitted expressions of interest in the channel. Specifically, Oasis, which is Lucky's successor-in-interest, and Mic Rathie have filed applications for Channel 252C2 at Prescott Valley. Under these circumstances, the allotment at Prescott Valley will remain. *See Lexington, MI,* 7 FCC Rcd 2102 (1992).

12. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Payne-Prescott IS DISMISSED.

13. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Southwest FM Broadcasting, Co., Inc. IS DENIED.

14. IT IS FURTHER ORDERED, That the Petition for Stay filed by Payne-Prescott IS DISMISSED.

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED. Authority for this action is contained in Sections 4 and 303 of the Communications Act of 1934, as amended.

16. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[6] Southwest states that it filed comments with the Commission relating these same facts and contentions after adoption but prior to the release of the *R&O* in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-126

In the Matter of

Amendment of Section 73.202(b), RM-7993
Table of Allotments,
FM Broadcast Stations.
(White Stone, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 4, 1992; Released: June 19, 1992

Comment Date: August 10, 1992
Reply Comment Date: August 25, 1992

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Windmill Communications ("petitioner"), permittee of Station WNDJ-FM, Channel 261A, White Stone, Virginia, requesting the substitution of Channel 285A for Channel 261A at White Stone and modification of Station WNDJ-FM's construction permit to specify operation on Channel 285A. Petitioner states it will apply for channel, if allotted.

2. In support of its proposal, petitioner advises that due to the site restrictions on Channel 261A, the permissible land area on which Station WNDJ-FM could locate is limited to two small peninsulas extending into Chesapeake Bay. Petitioner states these small protuberances into the Bay consist of inaccessible wetlands or waterfront residential property. Petitioner states the substitution of Channel 285A for Channel 261A will double the land area served by 1540 square kilometers and increase the population by 50 percent. Petitioner avers that the channel substitution would also benefit the public by enabling Station WNDJ-FM to increase power to six kilowatts and to permit the location of a radio tower on land devoid of environmental and zoning obstacles now encountered by petitioner at its presently available site.

3. We believe the public interest would be served by proposing the substitution of Channel 285A for Channel 261A at White Stone, since it could provide the community with an improved FM service. Channel 285A can be allotted to White Stone in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.7 kilometers (4.2 miles) northwest to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's construction permit for Station WNDJ-FM to specify operation on Channel 285A.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
White Stone, Virginia	261A	285A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 10, 1992,** and reply comments on or before **August 25, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard F. Swift, Esq.
Tierney & Swift
1200 Eighteenth Street, N.W.
Suite 210
Washington, D.C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

[1] The coordinates for Channel 285A at White Stone are North Latitude 37-42-00 and West Longitude 76-26-00.

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-129

In the Matter of

Amendment of Section 73.202(b), RM-8006
Table of Allotments,
FM Broadcast Stations.
(Grundy Center, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 10, 1992; Released: June 19, 1992

Comment Date: August 10, 1992
Reply Comment Date: August 25, 1992

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Grundy Broadcasting Company ("petitioner") requesting the substitution of Channel 249C3 for Channel 249A at Grundy Center, Iowa, and the modification of Station KGCI-FM's license to specify operation on the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 249C3 for Channel 249A at Grundy Center since it could provide the community with a wide coverage area FM service and enable Station KGCI-FM to expand its coverage area. Channel 249C3 can be allotted to Grundy Center in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.2 kilometers (11.3 miles) east to avoid a short-spacing to Station KHBT, Channel 249A, Humbolt, Iowa, and to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify Station KGCI-FM's license to specify Channel 249C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Grundy Center or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Grundy Center, Iowa	249A	249C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 10, 1992,** and reply comments on or before **August 25, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Cary S. Tepper, Esq.
Putbrese, Hunsaker & Ruddy
6800 Fleetwood Road, Suite 100
P.O. Box 539
McLean, Virginia 22101
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 249C3 at Grundy Center are North Latitude 42-21-25 and West Longitude 92-33-14.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-130

In the Matter of

Amendment of Section 73.202(b), RM-8007
Table of Allotments,
FM Broadcast Stations.
(Canyon City, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 10, 1992; Released: June 19, 1992

Comment Date: August 10, 1992
Reply Comment Date: August 25, 1992

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Blue Mountain Broadcasting ("petitioner") requesting the allotment of Channel 233A to Canyon City, Oregon, as the community's first local aural broadcast service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 233A to Canyon City, Oregon, since it could provide the community with its first local FM service. Channel 233A can be allotted to Canyon City without the imposition of a site restriction.[1] Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Canyon City, Oregon	--	233A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **August 10, 1992,** and reply comments on or before **August 25, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

J. Dominic Monahan, Esq.
Dow, Lohnes & Albertson
1255-23rd Street, N.W., Suite 500
Washington, D.C. 20037
(Counsel to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

[1] The coordinates for Channel 233A at Canyon City are North Latitude 44-23-18 and West Longitude 118-56-54.

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-131

In the Matter of

Amendment of Section 73.202(b), RM-8005
Table of Allotments,
FM Broadcast Stations.
(Copenhagen, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 10, 1992; Released: June 19, 1992

Comment Date: August 10, 1992
Reply Comment Date: August 25, 1992

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Tia A. Soliday ("petitioner") requesting the substitution of Channel 294C3 for Channel 294A at Copenhagen, New York, and the modification of Station WWLF-FM's construction permit to specify the higher class channel. Petitioner states that she will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 294C3 for Channel 294A at Copenhagen since it could provide the community with a wide area coverage FM service and enable Station WWLF-FM to expand its coverage area. As requested, we also propose to modify Station WWLF-FM's construction permit to specify Channel 294C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 294C3 at Copenhagen or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Channel 294C3 can be allotted to Copenhagen in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.3 kilometers (7 miles) northeast to avoid a short-spacing to Station WPCX, Channel 295B, Auburn, New York.[1] While the allotment would be short-spaced to Station CKO-1, Channel 295C1, Ottawa, Ontario, and vacant Channel 293A at Brockville, Ontario, Canada, we believe that the use of Channel 294C3 at Copenhagen will not result in any prohibited interference. Therefore, since Copenhagen is located within 320 kilometers (200 miles) of the U.S.-Canadian border, we will request concurrence by the Canadian government in the allotment of Channel 294C3 as a specially negotiated allotment.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Copenhagen, New York	294A	294C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 10, 1992,** and reply comments on or before **August 25, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Tia A. Soliday
6481 Newport Road
Warners, New York 13164
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

[1] The coordinates for Channel 294C3 at Copenhagen are North Latitude 43-56-30 and West Longitude 75-33-00.

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-132

In re Applications of

CARNEGIE-MELLON STUDENT GOVERNMENT CORPORATION — File No. BPED-891108MA

For Construction Permit for a Major Change, Station WRCT(FM), Channel 202A
Pittsburgh, Pennsylvania
(hereafter "WRCT")

HE'S ALIVE, INCORPORATED — File No. BPED-900606MC

For Construction Permit for a New Noncommercial Educational FM Station
Channel 201A
Murrysville, Pennsylvania
(hereafter "HAI")

HEARING DESIGNATION ORDER

Adopted: June 4, 1992; Released: June 22, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station.[1]

2. HAI. HAI filed its original proposal on June 6, 1990. Upon review, the staff determined that HAI's application failed to meet the prohibited contour overlap requirements of 47 CFR § 73.509, resulting in interference caused within the existing licensed service area of WRCT. Consequently, the staff returned the application by letter dated December 6, 1990. In response, HAI filed an amended proposal on December 20, 1990 which eliminated the prohibited contour overlap with WRCT's licensed facility and requested *nunc pro tunc* reinstatement of its application. The staff determined that the amended proposal resolved the conflict which resulted in the return of the original application and reinstated the application by letter dated February 25, 1991. That letter also required HAI to rectify errors in its 47 CFR § 73.525 Channel 6 interference study.

3. On April 10, 1991, WRCT petitioned to deny the amended application, citing the deficient Channel 6 interference study and claiming that HAI did not have reasonable assurance of its proposed site (the WPTT TV tower). Two days later, on April 12, 1991, WJAC, Inc., licensee of Station WJAC-TV (Channel 6), Johnstown, Pennsylvania, also filed a petition to deny HAI's application, referencing the deficient Channel 6 study. In response to these pleadings and the staff's February 25, 1991 letter, HAI on May 20, 1991 submitted a minor amendment specifying directional operation at a new transmitter site. This amendment also reduced the population receiving Channel 6 interference to 2318 people, in compliance with 47 CFR § 73.525, and thereby mooted WJAC, Inc.'s petition to deny, which will therefore be denied. However, the amendment was assailed by WRCT in its July 15, 1991 supplement to its petition to deny, which argued that 1) HAI has not provided reasonable assurance of the availability of its new transmitter site; 2) the added expense of a directional antenna and new tower requires HAI to execute a new financial qualifications statement; 3) the directional information provided fails to comply with the requirements of 47 CFR § 73.316; and 4) adequate service would not be provided to HAI's proposed community of license, Murrysville.

4. Unlike the commercial FM service, an educational applicant is not required to provide a site availability certification as a condition for grant of its application. Similarly, educational stations are not held to a minimum level of coverage over the community of license. Consequently, we deny WRCT's assertion that HAI must comply with these inapplicable standards. With respect to the financial qualifications issue raised by WRCT, HAI correctly argues that no specific recertification is required. Nonetheless, in connection with a minor engineering amendment filed on October 11, 1991, HAI recertified that it is financially qualified. Thus, even if WRCT had raised a *prima facie* question concerning HAI's financial qualifications, which it had not, there would be no substantial and material question remaining on this issue.

5. With respect to the directional antenna exhibits provided by HAI, WRCT argues that HAI should have provided a complete description including manufacturer and model number for the proposed directional antenna. However, this information is not required to be provided at the construction permit application stage. At this time, HAI is merely required to provide a composite directional antenna pattern and a relative field tabulation, as it has done. The remaining items are to be provided with the license application, assuming grant of the construction permit.

6. WRCT's pleadings also claim that the directional antenna pattern submitted in the May 20, 1991 amendment violates the 2 dB/10^0 limit of 47 CFR § 73.316(b)(2) between the azimuths of 30^0 to 40^0, 140^0 to 150^0, 220^0 and 230^0, and 330^0 to 340^0. In addition, the pattern is said to exceed the 15^0 dB maximum-to-minimum limit of 47 CFR § 73.316(b)(2). HAI does not dispute these findings; rather, it has it amended its directional pattern on October 11,

[1] Although the applications are apparently for two different communities, the interfering contour of each application overlaps the protected contour of the other. Since the applications were timely filed and the grant of one would effectively preclude the grant of the other, they are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

1991 to eliminate these violations, claiming a "drafting error". These changes moot WRCT's objections to the directional antenna.

7. Having addressed the pleadings of WRCT and finding no remaining issue of substance, WRCT's petition to deny against amended HAI proposal will be denied. Also, HAI's above-referenced amendments filed May 20 (and supplemented on May 23) and October 11, 1991 will be accepted for good cause shown. Nevertheless, because they were filed after the April 12, 1991 deadline for filing amendments as of right, any resulting comparative upgrading will be disallowed.

8. *Environmental.* Our engineering study based upon OST Bulletin No. 65, October, 1985 entitled "Evaluating Compliance with Specific Guidelines for Human Exposure to Radiofrequency Radiation" reveals that WRCT and HAI did not address the matter of how they would protect workers on their respective towers from RF radiation exposure. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that Broadcasting and National may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since WRCT and HAI failed to indicate how workers engaged in maintenance and repair on the tower would be protected from exposure to levels exceeding the ANSI guidelines, the applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally* OST Bulletin No. 65, *supra*, at 28. Accordingly, WRCT and HAI will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of the respective proposals. *See* 47 C.F.R. § 1.1308(d).

9. *Share-time.* HAI has indicated that an attempt has been made to "explore settlement options with WRCT." In view of this vague statement, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

10. *Section 307(b) & Contingent Comparative Issues.* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

11. *Comparative Coverage.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

12. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to WRCT and HAI in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1.1319.

2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and

whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service. [2]

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That the petitions for leave to amend filed on May 20 (as supplemented on May 23) and October 11, 1991 by HAI ARE GRANTED for good cause shown, and the corresponding amendments ARE ACCEPTED, but any resulting comparative upgrading will be disallowed.

15. IT IS FURTHER ORDERED, That the petitions to deny, filed on April 10 (supplemented on July 15), 1991 by WRCT, and filed on April 12, 1991 by WJAC, Inc. ARE DENIED.

16. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

[2] Recently, in a Notice of Proposed Rulemaking in GC Docket No. 92-52, the Commission tentatively concluded that this noncommercial educational comparative issue is vague and should be eliminated. *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, FCC 92-98, released April 10, 1992, at paras. 39-40. Nevertheless, any revised rules to be adopted in that proceeding will apply only to applicants not in hearing as of the effective date of the new rules. *Id.* at para. 41.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell's Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs	AAD 90-12

MEMORANDUM OPINION AND ORDER

Adopted: June 11, 1992; Released: June 19, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On January 9, 1991, Pacific Bell (Pacific) filed a cost allocation manual (CAM) revision[1] by which it proposes to implement a statistically valid sampling technique to augment its current positive time reporting procedures for a limited category of employees,[2] namely, field technicians. Pacific believes its proposed statistical sampling technique -- which it calls Enhanced Time Distribution Process (ETDP) -- will increase efficiency and productivity and at the same time lead to more accurate results. Comments were filed by BellSouth Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth); U S West Communications, Inc. (U S West); and The People of the State of California and the Public Utilities Commission of the State of California (California). Pacific filed a reply. We approve Pacific's proposed CAM revision.

2. On February 4, 1991, the Accounting and Audits Division (Division) released an Order[3] which stayed the effective date of Pacific's proposed CAM revision until September 10, 1991. In that Order, the Division found that Pacific's proposal raised serious concerns as to how costs associated with operating personnel would be allocated between regulated and nonregulated activities and how these costs would be assigned initially to Part 32 accounts. The Division decided that more time was needed to determine whether Pacific's proposed change in time reporting was in compliance with the Commission's cost allocation rules and policies.

3. On May 13, 1991, in response to guidance received from the Division, Pacific requested an interpretation regarding whether statistical sampling methods may be used for recording expenses in the accounts prescribed in Part 32, Uniform System of Accounts for Telecommunications Common Carriers.[4] Approval of Pacific's CAM change and the Division's response to the interpretation request were postponed until Pacific could arrange for an independent audit of its proposed ETDP.[5] On March 9, 1992, the workpapers from this audit were made available to the Division Staff for review. On May 6, 1992, the Division issued a letter of interpretation to Pacific stating that Pacific's ETDP is an acceptable means of determining the wage expense distribution to the Part 32 accounts for the specified technician groups.[6]

II. ANALYSIS OF PACIFIC'S PROPOSAL AND SUMMARY OF COMMENTS

4. Pacific proposes to use a statistical sampling methodology in lieu of the current method of positive time reporting for field technicians.[7] Pacific states that employees covered by this sampling technique will be subdivided into geographic clusters based upon their functions and job

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[1] On January 10, 1991, Pacific refiled its revision due to a typographical error contained in the cover letter accompanying the January 9, 1991 submission.

[2] In the *Joint Cost Order*, the Commission required Tier 1 carriers (defined as local exchange carriers that earn more than $100 million in total company regulated annual revenues --*see* 1984 Annual Statistical Volume 11 of USTA Statistical Reports of Class A & B Telephone Companies for 1983) to file manuals to separate the costs of regulated telecommunications services from the costs of nonregulated activities. Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6383 (1987), *modified on further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990). The manuals describe the carriers' nonregulated activities, list the activities they treat as incidental activities, and provide information on their affiliate transactions, employee time reporting procedures, and cost apportionment methods. Pacific filed its initial manual on September 1, 1987. It has filed revisions pursuant to two Bureau Orders and has subsequently filed routine quarterly updates. *See* Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287 (Com.Car.Bur. 1988) (*Nevada and Pacific Order);* and Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 7081 (Com. Car. Bur. 1988) (*Nevada and Pacific Revision Order).* The *Nevada and Pacific Order* defines the type of changes in the Pacific cost manual that should be submitted quarterly, on March 31, June 30, September 30, and December 31 of each year.

[3] Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 6 FCC Rcd 637 (1991).

[4] 47 C.F.R. Part 32.

[5] Letter of October 9, 1991, from Kenneth P. Moran, Chief, Accounting and Audits Division, to Karen S. Nishida, Director, Federal Regulatory Relations, for Pacific Telesis. This audit was completed by Price Waterhouse on January 31, 1992, and the results were presented to the Division on February 20, 1992.

[6] Letter of May 6, 1992, from Kenneth P. Moran, Chief, Accounting and Audits Division, to Sheryl L. Herauf, Director, Federal Regulatory Relations, for Pacific Telesis.

[7] In positive time reporting, an employee's day is parcelled into increments of time, typically six minutes to one hour in length. The employee then accounts for all or most of the time worked during a given day by dividing the total amount of hours worked among specific jobs or functions performed.

titles.[8] Each cluster will then be individually sampled monthly to reflect the unique time distribution characteristics of the cluster. Pacific explains that for the monthly samples, employees within each cluster will be randomly selected.[9] Sampled technicians will identify specific activities and time incurred with the daily workload. Skilled coding analysts will then convert the time reported by the technicians into the various accounting classifications. Pacific claims that this application is aligned with well-established, statistically-based accounting procedures and will not change cost pool allocation methods. Pacific also believes that this methodology is in compliance with the Commission's reporting and auditing requirements.[10]

5. BellSouth and U S West support the use of statistical sampling to administer the Commission's cost allocation rules, and believe that valid statistical sampling will minimize administrative burdens.[11] California, on the other hand, urges the Commission not to approve such fundamental changes in the CAM until it is determined that such changes are reasonable. California maintains that employee time reporting is the linchpin of the Part 64 cost allocation rules, and that accurate time reporting is essential to ensure that ratepayers do not improperly subsidize nonregulated activities. California states that where fundamental changes to established time reporting methods are proposed, it is essential to determine whether and to what extent cost savings and increased employee productivity are actually realized. California also believes that Pacific should explain how its statistical sampling will be done.[12] Finally, California believes that Pacific's proposed time reporting system should be tested in parallel with its current time reporting system for one year.

6. In its reply, Pacific provides additional information about its ETDP describing its employee sampling and time distribution processes.[13] In addition, Pacific states that it is testing the ETDP in parallel with its current time reporting system and has been doing so for the past several months. Pacific believes that parallel testing will enable it to assess the effectiveness of the new system and to perfect the new methodology and procedures.[14]

III. DISCUSSION

7. We agree with California that an accurate time reporting system is essential in monitoring the allocation of costs between regulated and nonregulated activities. We also share California's view that a time reporting system that relies on the use of statistical sampling must be examined in detail and thoroughly tested in order to ensure its accuracy. Because of these concerns, we required Pacific to obtain an independent audit of the ETDP. Before Price Waterhouse conducted the audit, the Division staff met with the auditors and outlined the issues that the audit should address: (1) the statistical validity of the sampling plan; (2) the rationale for the three-month averaging technique; (3) the effectiveness of the proposed interview process; (4) the effect of statistical sampling on Parts 32, 36 and 64 results; (5) the adequacy of the internal controls and audit trail; and (6) the dollar savings of using ETDP.

8. The comprehensive Price Waterhouse audit concluded that: (1) the sampling plan used in the ETDP is statistically valid; (2) the three-month averaging technique achieves accurate results; (3) there is no change in total Part 32 expense dollars, although a significant difference exists in the dollars reported for certain accounts under time reporting versus ETDP which Price Waterhouse attributes to a more accurate reporting of time; (4) the impact on both Parts 64 and 36 results appear to be minimal; (5) an adequate audit trail exists; and (6) the change from time reporting to ETDP will result in dollar savings because technicians' time will be better utilized. Price Waterhouse also recommends that Pacific improve its internal controls by establishing a management control position to monitor and validate the work of the analysts and observe analyst interviews.

9. Based on our review of the audit and associated workpapers, we conclude that Pacific's proposed system can provide reliable results and substantial savings to the company. We are also satisfied that Pacific's proposed system will attain results for the specified groups of technicians that are as accurate as the positive time reporting system currently in place. The Price Waterhouse audit report and subsequent review by our staff of its workpapers has satisfied our concerns with Pacific's proposed ETDP. Therefore, conditioned upon the adoption of the improvements recommended by Price Waterhouse, we approve Pacific's CAM change.

10. Our approval of Pacific's CAM revision is limited to the use of a statistical sampling methodology to track positive time reporting for field technicians. Pacific may wish to expand the use of statistical sampling to other areas and other carriers may likewise desire to implement statistically-based reporting processes as a means of determining costs to be assigned to the Part 32 accounts. To assure that any future statistical sampling plans adequately address our concerns, the Accounting and Audits Division plans to provide additional guidance for the use of statistical sampling by issuing a Responsible Accounting Officer Letter in the near future.

IV. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that the cost manual revision filed January 9, 1991, by Pacific Bell IS APPROVED, subject to the condition stated in para. 8, above.

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[8] The work groups and Function Codes (FCs) are as follows: Installation/Repair-POTS (FCs 4150-4152), Installation/Repair-Special Services (FCs 4150-4152), Maintenance (FC 4230), Broadcast Services (FC 4150, 4330, 4740), Switching (FCs 4300, 4310, 4320, 4330, 4340), Frames (FC 4350), Official Company Services (4120-4122), and Network Operations (FCs 4320, 4730).

[9] Pacific CAM Revisions at 2-4.

[10] Pacific CAM Revision Cover Letter.

[11] BellSouth Comments at 2, and U S West Comments at 3.

[12] California Comments at 2.

[13] Pacific Reply, Exhibits 1-3.

[14] *Id.* at 6.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PROVIDENCE TMC, LTD.,
Complainant,

v.

NEW ENGLAND TELEPHONE COMPANY,
Defendant.

File No. E-91-118

ORDER

Adopted: June 12, 1992; Released: June 22, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceeding to determine whether and to what extent the complainant, Providence TMC, Ltd. (Providence), may be entitled to recover damages as a result of defendant's alleged violation of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that Providence presents against the defendant local exchange carrier (LEC) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant case parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendant's liability for damages has been determined. We note that both complainant and defendant have argued the issue of liability extensively in their pleadings filed in the captioned case.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Providence's damages claims rest primarily on the contention that the proper measure of the damage it has suffered as a result of defendant's alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendant for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if defendant's rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order), recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order), appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[3] The complainants relied, as does Providence in the instant complaint, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order)* and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982, (Com.Car.Bur. 1992).

[5] Complainant and defendant, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] Providence also seeks interest on this amount. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is

5. Defendant raises a number of challenges to complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. Defendant argues that any damages award based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC* [8] and, therefore, unlawful. Defendant contends that the fact that its rates produced overearnings in one access service category is not sufficient to establish damage to complainant when its overall interstate rate of return was below the authorized level, and that it must be allowed to offset overearnings in one or more categories with underearnings in other categories. Defendant also contends that an award of damages based on the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Providence may have suffered actual damage as a consequence of defendant's alleged violation of the Commission's rate of return prescription. We tend to agree with Providence, in principle, that a possible measure of the damages stemming from defendant's alleged rate of return violation could be the difference between the rates it actually paid for defendant's interstate access services and the rates it would have paid if defendant's rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainant in the event that defendant is found liable. On the contrary, it is conceivable that for the relevant service categories defendant may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of its access service offerings to establish or support its claim that complainant suffered no actual harm or incurred no ascertainable damages attributable to defendant's excessive earning levels. Moreover, defendant's factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by defendant that would tend to show that Providence's share of the excessive earnings realized by defendant in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding Providence's purchase of other interstate access services from defendant for the relevant monitoring period. We will also consider any other evidence submitted by defendant that would refute Providence's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendant's rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendant to make available to complainant information necessary to compute the difference between the amount complainant actually paid for defendant's access services during the relevant monitoring period and the amount complainant would have paid if defendant's rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendant the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendant.[9]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendant a written request for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendant may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendant may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainant and the defendant shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainant and the defendant shall submit reply briefs no later than 10 days after the submission of initial briefs.

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well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceeding will depend on the particular facts established by the parties.

[8] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,034 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[9] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTH TEL, INC.,
Complainant,

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

File No. E-90-390

ORDER

Adopted: June 12, 1992; Released: June 22, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceeding to determine whether and to what extent the complainant, South Tel, Inc. (South Tel), may be entitled to recover damages as a result of defendant's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that South Tel presents against the defendant local exchange carrier (LEC) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant case parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendant's liability for damages has been determined. We note that both complainant and defendant have argued the issue of liability extensively in their pleadings filed in the captioned case.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of this complaint proceeding will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. South Tel's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendant's alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendant for interstate access services during the period January 1, 1987 through December 31, 1988,

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order), recon. denied,* 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order), appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does South Tel in the instant complaint, on rate of return monitoring reports (Form 492) filed with the Commission by the defendant as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order)* and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendant, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

and the amount it would have paid if the defendant's rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. The defendant raises a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. The defendant argues that any damages award based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC* [8] and, therefore, unlawful. Defendant also contends that the fact that its rates produced overearnings in one access service category does not constitute a proper measure of damages to the complainant.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which South Tel may have suffered actual damage as a consequence of defendant's alleged violations of the Commission's rate of return prescription. We tend to agree with South Tel, in principle, that a possible measure of the damages stemming from defendant's alleged rate of return violations could be the difference between the rates it actually paid for defendant's interstate access services and the rates it would have paid if defendant's rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendant is found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendant may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of its access service offerings to establish or support its claim that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendant's excessive earning levels. Moreover, the defendant's factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by defendant that would tend to show that South Tel's share of the excessive earnings realized by defendant in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding South Tel's purchase of other interstate access services from defendant for the relevant monitoring period. We will also consider any other evidence submitted by defendant that would refute South Tel's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendant's rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendant to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for defendant's access services during the relevant monitoring period and the amount complainant would have paid if defendant's rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendant the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendant.[9]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendant written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendant may perform the calculation and provide this information to the complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendant may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainant and the defendant shall file their initial briefs no later than 20 days after the close of the thirty-day discovery

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[7] South Tel also seeks interest on this amount. We note that defendant argues that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceeding will depend on the particular facts established by the parties.

[8] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[9] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

period and that the complainant and the defendant shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL TELEPHONE EXCHANGE, INC.,
Complainant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

File No. E-91-114

ORDER

Adopted: June 12, 1992; **Released: June 22, 1992**

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceeding to determine whether and to what extent the complainant, National Telephone Exchange, Inc. (NTX), may be entitled to recover damages as a result of defendant's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that NTX presents against the defendant local exchange carrier (LEC) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant case parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendant's liability for damages has been determined. We note that both complainant and defendant have argued the issue of liability extensively in their pleadings filed in the captioned case.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of this complaint proceeding will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. NTX's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendant's alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendant for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendant's rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. The defendant raises a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order), recon. denied,* 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order), appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does NTX in the instant complaint, on rate of return monitoring reports (Form 492) filed with the Commission by the defendant as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order)* and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendant, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] NTX also seeks interest on this amount. We note that defendant argues that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of

the *MCI* and *AT&T Liability Orders*. The defendant argues that any damages award based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[8] and, therefore, unlawful. Defendant contends that the fact that its rates produced overearnings in one access service category does not constitute a proper measure of damages. Defendant maintains that, under *AT&T v. FCC*, it must be allowed to offset overearnings in individual access categories against underearnings in access categories. The defendant also contends that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which NTX may have suffered actual damage as a consequence of defendant's alleged violations of the Commission's rate of return prescription. We tend to agree with NTX, in principle, that a possible measure of the damages stemming from defendant's alleged rate of return violations could be the difference between the rates it actually paid for defendant's interstate access services and the rates it would have paid if defendant's rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendant is found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendant may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of its access service offerings to establish or support its claim that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendant's excessive earning levels. Moreover, the defendant's factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by defendant that would tend to show that NTX's share of the excessive earnings realized by defendant in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding NTX's purchase of other interstate access services from defendant for the relevant monitoring period. We will also consider any other evidence submitted by defendant that would refute NTX's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendant's rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendant to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for defendant's access services during the relevant monitoring period and the amount complainant would have paid if defendant's rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendant the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendant.[9]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendant written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendant may perform the calculation and provide this information to the complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendant may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainant and the defendant shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainant and the defendant shall submit reply briefs no later than 10 days after the submission of initial briefs.

Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceeding will depend on the particular facts established by the parties.

[8] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[9] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

STS TELECOMMUNICATIONS, INC.,
Complainant,

v.

GTE SOUTHWEST INCORPORATED,
Defendant.

File No. E-91-119

ORDER

Adopted: June 12, 1992; **Released: June 22, 1992**

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceeding to determine whether and to what extent the complainant, STS Telecommunications, Inc. (STS), may be entitled to recover damages as a result of defendant's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that STS presents against the defendant local exchange carrier (LEC) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant case parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendant's liability for damages has been determined. We note that both complainant and defendant have argued the issue of liability extensively in their pleadings filed in the captioned case.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of this complaint proceeding will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. STS's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendant's alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendant for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendant's rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

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[3] The complainants relied, as does STS in the instant complaint, on rate of return monitoring reports (Form 492) filed with the Commission by the defendant as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendant, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] STS also seeks interest on this amount. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceeding will depend on the particular facts established by the parties.

5. The defendant raises several challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. The defendant argues that any damages award based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[8] and, therefore, unlawful. Defendant contends that the fact that its rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when its overall interstate rate of return was below the authorized level.[9] Defendant maintains that, under *AT&T v. FCC*, it must be allowed to offset overearnings in individual access categories against underearnings. Defendant also contends there is no significant difference between an award of damages based on the measure advocated by the by the complainant and the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which STS may have suffered actual damage as a consequence of defendant's alleged violations of the Commission's rate of return prescription. We tend to agree with STS, in principle, that a possible measure of the damages stemming from defendant's alleged rate of return violations could be the difference between the rates it actually paid for defendant's interstate access services and the rates it would have paid if defendant's rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendant is found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendant may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of its access service offerings to establish or support its claim that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendant's excessive earning levels. Moreover, the defendant's factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by defendant that would tend to show that STS's share of the excessive earnings realized by defendant in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding STS's purchase of other interstate access services from defendant for the relevant monitoring period. We will also consider any other evidence submitted by defendant that would refute STS's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendant's rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendant to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for defendant's access services during the relevant monitoring period and the amount complainant would have paid if defendant's rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendant the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendant.[10]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendant written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendant may perform the calculation and provide this information to the complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendant may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainant and the defendant shall file their initial briefs no later than 20 days after the close of the thirty-day discovery

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[8] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[9] Defendant contends that the relevant overall interstate rate of return is that of GTE's operating companies in the aggregate, not of each individual company. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990). We find that the Commission's ruling is equally applicable to the defendants in this proceeding.

[10] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

period and that the complainant and the defendant shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ELLIS THOMPSON CORPORATION File No. 14261-CL-P-134-A-86

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 134, Atlantic City, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1992; Released: June 22, 1992

By the Commission:

I. INTRODUCTION

1. In this Order, we address an application for review and a "Supplement to Application for Review" filed by Telephone and Data Systems, Inc. (TDS) and its subsidiary United States Cellular Corporation (USCC) (collectively referred to as TDS). TDS' application for review, filed May 1, 1989, seeks reversal of an order released by the Common Carrier Bureau (Bureau) which upheld the grant of Ellis Thompson Corporation's above-captioned application by the Mobile Services Division (MSD). TDS' "Supplement to Application for Review" filed April 17, 1991, asserts that American Cellular Network Corp. (Amcell) has assumed *de facto* control of the Atlantic City cellular system licensed to Ellis Thompson Corporation (Thompson)[1] without obtaining consent from the Commission, and has attempted to conceal that control from the Commission. For the reasons set forth in this order, we deny TDS' application for review and its "Supplement to Application for Review."

II. BACKGROUND

2. In its Order at 4 FCC Rcd 2599 (Com. Car. Bur. 1989) (*Bureau Order*), the Bureau affirmed the conditional grant of the above-captioned application by the MSD. The MSD had conditioned its grant upon the removal of paragraph 16 of an option agreement between TDS, USCC and Mr. Thompson, which provides, *inter alia*, for the sale of Thompson's controlling interest to USCC. 3 FCC Rcd 3962, 3964 (Mob. Serv. Div. 1988). In response to TDS' petition for clarification or partial reconsideration of the MSD's order, the *Bureau Order* found that both clauses of paragraph 16 of the option agreement are objectionable because they interfere with the licensee's ability to conduct daily operations and to enter into contracts in the course of normal business operations. The first clause states that, without the express consent of USCC, Thompson can not make any agreement with respect to his cellular system if it relates to the provisions of goods or services requiring an aggregate expenditure of $50,000 or more. The second clause states that any such agreement can be cancelled upon sixty days written notice from USCC at any time after the exercise of any of USCC's options under the option agreement. In addition, the Bureau denied TDS' request that Thompson's grant be conditioned upon the abrogation of Section 3.4(b) of the Cellular Management Services' settlement agreement entered into by Mr. Thompson and other non-wireline applicants in the Atlantic City Metropolitan Statistical Area (MSA), which requires a two-thirds, majority vote among settlement group members before selling control of the license (*i.e.*, the "supermajority" provision). The Bureau noted that the Commission had approved such supermajority voting provisions in the past, citing *News International, PLC*, 97 FCC 2d 349, 365-66 (1984).

III. ISSUE ANALYSIS

Restraints on Licensee's Control

3. TDS' application for review[2] requests that the Commission rule (1) that the grant of Thompson's application be conditioned on the removal of Section 3.4(b) of the Cellular Management Services (CMS) settlement agreement (the supermajority provision) and (2) that the second clause of paragraph 16 of the Thompson-TDS option agreement is not an impermissible restraint on Mr. Thompson's day-to-day control of the Atlantic City cellular system. TDS claims that Section 3.4(b) of the CMS settlement agreement constitutes an undue restriction on Mr. Thompson's freedom of action and could be interpreted as barring him from fulfilling his agreement to sell his interest in the Atlantic City cellular system to TDS. TDS contends that giving minority owners any form of veto power over a decision by a permittee to sell his interest in an authorization would be inconsistent with the Commission's policy that non-wireline tentative selectees and permittees must remain in control of their authorizations until the Commission approves a transfer or assignment, citing, *e.g.*, *Public Notice, Mobile Services Division Releases Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications in Markets Beyond Top 120 (Cellular Control Notice)*, 1 FCC Rcd 3 (Mob. Serv. Div. 1986). TDS also claims that the Bureau's staff has insisted upon the removal of clauses in settlement agreements which require the consent of minority interest holders to decisions to sell authorizations. TDS includes at Attachment A of its pleading a letter dated September 15, 1986, written on behalf of the non-wireline tentative selectee in the Poughkeepsie, New York MSA, which states that a similar clause in a settlement agreement was being withdrawn after consultation with the staff. In this light, TDS argues that the Commission should require that the Bureau adhere to its earlier policy which opposed such supermajority clauses.

4. Section 3.4(b) of the CMS settlement agreement (the supermajority provision) requires a two-thirds majority vote among settlement group members to sell control of the licensee, but does not deprive Mr. Thompson of the opportunity to exercise his rights as the majority owner of the non-wireline authorization for the Atlantic City MSA. Thus, while a minority owner may not control day-to-day operations of a permittee or licensee, supermajority provisions giving minority owners the power to block disposition of the licensee's major assets outside the normal course of business do not improperly impinge on the

licensee's prerogatives. *See News International, PLC*, 97 FCC 2d 349, 365-66 (1984); *McCaw Cellular Communications, Inc.*, 4 FCC Rcd 3784, 3789 (Com. Car. Bur. 1989). In this regard, the veto clause in the Poughkeepsie letter, *supra*, is broader than the narrowly drawn clause at issue here. The provision discussed in that letter required two-thirds approval for "all major policy decisions of the Corporation to be formed...," whereas the two-thirds provision in Mr. Thompson's settlement agreement is limited to the one-time sale of control of the licensee. Therefore, we shall not condition the grant of Thompson's application on the removal of Section 3.4(b) of the CMS settlement agreement.

5. TDS also contends that the second clause of paragraph 16 of TDS's option agreement with Thompson should be reinstated, because that clause would not be effective until TDS was in control of the Atlantic City cellular system. Thus, TDS asserts, once TDS has acquired Thompson's controlling interest, it should be able to manage the system in accordance with its own business judgment, unfettered by prior long-term agreements entered into by Thompson. We concur with the *Bureau Order* that both clauses of paragraph 16 of the option agreement between TDS and Thompson must be abrogated because they interfere with Thompson's ability to conduct daily operations and to enter into contracts in the course of normal business operations. We agree with Amcell's observation, summarized in paragraph 5 of the *Bureau Order*, that third parties would refrain from entering into any agreements with Thompson because, under the second clause of paragraph 16 of the option agreement, those contracts would not be binding upon a successor to the system. Footnote 6 of the *Bureau Order* gives examples of such contracts, including equipment contracts with vendors and switching agreements with other licensees. In light of the foregoing, we reject the requests made in TDS' application for review.

Alleged Unauthorized Transfer of Control

6. In its "Supplement to Application for Review" (Supplement),[3] TDS asserts that Amcell has assumed *de facto* control of the Atlantic City cellular system licensed to Thompson and has attempted to conceal that control from the Commission.[4] Pursuant to a letter agreement dated June 12, 1986, and later amended, TDS holds an option to acquire Mr. Thompson's majority interest in the Atlantic City cellular system. (*See* paragraph 2 of the *Bureau Order* for an explanation of the option agreement between Mr. Thompson and TDS.) On December 30, 1987, Thompson and Amcell entered into a construction-switching-maintenance agreement, pursuant to which Amcell was to construct Thompson's system and perform all switching and maintenance functions for a term of five years. The agreement also provided that Thompson's Atlantic City system was to utilize the switch serving Amcell's Wilmington, Delaware cellular system. In its Supplement, TDS claims that Amcell and Thompson also executed two other contracts on December 30, 1987, which "set in motion a total *de facto* transfer of control from Thompson to Amcell" and that these contracts were deliberately concealed from the Commission. One contract is a contingent option agreement[5] giving Amcell the right to require Mr. Thompson to sell his interest to Amcell and giving Mr. Thompson the right to require Amcell to buy Thompson's interest in the event that TDS does not or can not exercise its option. On May 22, 1990, Amcell and Mr. Thompson amended their contingent option agreement to increase the option price from $1,500,000 to $6,000,000 and Amcell paid $800,000 to Mr. Thompson, which amount was to be applied toward the Amcell option price.

7. The foregoing contingent option agreement also provides that Amcell will loan Mr. Thompson and/or the Ellis Thompson Corporation whatever capital contributions might be required to acquire and/or maintain their equity interests in the new entity which would be the Atlantic City licensee, to the extent that such "capital contributions" are not advanced by TDS. The agreement also explained that the loans would be repayable exclusively from dividends and distributions paid to Mr. Thompson and the Ellis Thompson Corporation by the licensee and that if Amcell acquired Mr. Thompson's and the Ellis Thompson Corporation's interests in the licensee pursuant to the option agreement, Amcell would cancel the loans.

8. Amcell and Mr. Thompson also entered into an indemnity agreement on December 30, 1987, which provided that Amcell would pay Mr. Thompson an amount equal to the balance of the TDS option price ($750,000) if Thompson's cellular radio application were denied by the FCC due to his execution of the construction-switching-maintenance agreement with Amcell or due to anything filed with the Commission by Amcell.[6] The indemnification was conditioned on Amcell having control over any civil litigation between TDS and Mr. Thompson and any litigation at the Commision arising out of the execution of the construction-switching-maintenance agreement with Amcell. On September 8, 1988, Amcell and Mr. Thompson amended their indemnity agreement to provide that Amcell would pay Mr. Thompson $1,500,000 if Thompson's cellular authorization were revoked by the FCC as a proximate result of the contemporaneous amendment to the construction-switching-maintenance agreement.

9. On September 8, 1988, Amcell and Mr. Thompson amended their construction-switching-maintenance agreement (henceforth "management agreement") to provide that Amcell would manage and operate the system.[7] That amendment also doubled the agreement's initial term from five to ten years and provided for two five-year renewals at Amcell's option but not Thompson's. TDS asserts that the cumulative effect of all the arrangements between Mr. Thompson and Amcell has been to put Amcell in complete control of the Atlantic City cellular system, even though Amcell is not the licensee. Thus, TDS claims that, pursuant to Section 4A.2(a) of the recent amendment to the management agreement, Amcell hires, trains, promotes and fires all system personnel. Further, under Section 4A.2 of the same amendment, Amcell is responsible for establishing office and accounting procedures; establishing procedures for hiring agents and dealers; undertaking promotional activities; studying, planning and establishing procedures for expansion of the system and completing and filing all reports, applications and other filings required to be made with the FCC. In addition, TDS contends that paragraph 5.1.10 of a February 15, 1989 loan agreement between Mr. Thompson and Provident National Bank guarantees Amcell's management agreement with Thompson by making termination of that agreement an event constituting default on the loan. TDS notes that the management agreement provides that Amcell will receive a management fee every month equal to nine percent of "gross system revenues" as well as reimbursement of its out-of-pocket expenses.

10. TDS alleges that even though Mr. Thompson has the contractual right of "oversight and review" of Amcell's activities, he has neither the ability nor the incentive to exercise that right. In this regard, TDS observes that Mr. Thompson is a seventy-four year old retired welder who lives in the State of Washington and has had no prior experience or background which would enable him to exercise control over the cellular system in Atlantic City, New Jersey. Moreover, TDS asserts, Mr. Thompson has no incentive to exercise the type of control that a prudent business person would normally exercise over his company's day-to-day operations because (1) Amcell has agreed to forgive all loans it has made to Mr. Thompson when Amcell acquires his interest under its contingent option agreement; (2) the amount payable under that option agreement is not dependent on how well or poorly the system is operated; (3) Amcell has agreed to assume all of Thompson's commercial and operating obligations when it becomes the licensee, and (4) the indemnity agreement guarantees that Mr. Thompson will receive $1,500,000 even if Thompson's license is revoked. In light of all the foregoing facts, TDS claims that Amcell has acquired control of Thompson's Atlantic City cellular system without receiving Commission approval of that transfer of control. TDS requests that the Commission require Amcell to cease exercising control of Thompson's cellular system and abrogate all of the agreements between Amcell and Thompson under which Amcell has exercised control. TDS also requests that the Commission require Amcell to cease using Section 3.4(b) (the supermajority provision) of the CMS settlement agreement to the extent that it permits Amcell to perpetuate its control over Mr. Thompson's disposition of his interest in the Atlantic City cellular system. In this regard, TDS asserts that Amcell has prevented the exercise of TDS' option in its agreement with Thompson to purchase Thompson's cellular system by claiming that the foregoing supermajority provision gives Amcell[8] the right to veto a sale to TDS.

11. In response to TDS' allegations, Amcell asserts that Thompson's decisions to use Amcell to construct Thompson's cellular system and provide switching and management services are rational business judgments wholly consonant with Commission precedents such as *Millicom of Omaha, Inc.*, 2 FCC Rcd 3754 (Com. Car. Bur. 1987) (proposed transferee's provision of financing and turnkey construction management did not constitute a transfer of control). Amcell denies that it concealed facts from the Commission or failed to disclose facts which were material to the disposition of issues raised by TDS on appeal, namely, the legality of paragraph 16 of the TDS-Thompson option agreement and Section 3.4(b) (the supermajority provision) of the settlement agreement between Mr. Thompson and other non-wireline applicants for the Atlantic City cellular market. Amcell claims that the original Thompson-Amcell management agreement, which was disclosed, only had relevance because of TDS' attempt to use paragraph 16 of its option agreement with Mr. Thompson to prevent the foregoing agreement with Amcell from being implemented. Amcell argues that the other documents revealed for the first time in TDS' Supplement, like the contingent option agreement between Amcell and Thompson, were not disclosed by Thompson because they were not relevant to the issues in this proceeding. Thus, Amcell asserts that its contingent option agreement with Mr. Thompson creates only inchoate rights which do not come into existence unless or until TDS' option lapses or cannot be exercised and that under the Commission's rules, the mere existence of an option does not raise transfer of control issues.[9] With respect to the indemnity agreement between Amcell and Mr. Thompson, Amcell observes that TDS also agreed to indemnify Thompson with regard to any litigation stemming from the second amendment to the TDS option agreement. *See* 4 FCC Rcd 2599 at paragraph 2. Amcell notes that the indemnity agreement between Mr. Thompson and Amcell is relatively standard and that paragraph 1(c) of the agreement provides that Amcell can take no action to settle litigation in derogation of Thompson's rights and that Mr. Thompson retains the right to be represented by his own counsel before the Commission.

12. Amcell also claims that an analysis of the six indicia of control in evaluating arrangements between licensees and system managers, which are set forth in *Cellular Control Notice*, *supra*, demonstrates that Thompson is in firm control of the Atlantic City non-wireline cellular system. Amcell asserts that Mr. Thompson has unfettered access to the cellular facilities in the Atlantic City system. Except for the shared Amcell switch, the Ellis Thompson Corporation (ETC) is the owner of all the cellular equipment utilized in the Atlantic City system and is the lessee for all of the cell sites.[10] Further, Amcell states that Mr. Thompson never has been, and never will be, denied reasonable access to Amcell's switch.[11] Amcell observes that Mr. Thompson makes visits to the Atlantic City system at regular intervals and the fact that he does not reside in Atlantic City is of no decisional consequence in determining whether the licensee is maintaining control of its cellular system, citing *Brian L. O'Neill*, 6 FCC Rcd 2572 (1991). Further, pursuant to Section 4A.2 of the construction-switching-management agreement between Thompson and Amcell, daily operations are subject to Thompson's ultimate supervision and control. Mr. Thompson must approve the annual budget for the system, any proposed expenditures outside the scope of the annual budget, and all checks in excess of $5,000, except for certain recurring payments for which the limit is $25,000.[12] Amcell asserts that Mr. Thompson is involved in all major policy decisions affecting the Atlantic City system. Amcell notes that Mr. Thompson receives periodic reports from Amcell detailing the status of operations and maintains regular contact with the Amcell management team, including quarterly meetings to discuss all aspects of the business over the past quarter and to discuss marketing and construction plans for the current quarter.[13] Further, pursuant to paragraph 4A(2)(h) of the management agreement between Amcell and Thompson, Amcell forwards any proposed applications or other papers to be filed with the Commission to Mr. Thompson's independent FCC counsel for review, execution by Thompson and filing with the FCC.[14]

13. Amcell contends that because ETC has hired Amcell to manage the system, ETC has no need for employees other than Mr. Thompson. Amcell explains that Mr. Thompson determines his own salary and is paid by ETC, not Amcell; and ETC, not Amcell, is financially responsible for the construction and operation of the Atlantic City system.[15] Amcell argues that the loan provision in ETC's loan from Provident Bank which requires Amcell's retention as system manager was a requirement imposed by the bank and Amcell has been advised that ETC has requested and the bank has agreed to have that provision removed.[16] Further evidence of Mr. Thompson's control of the system's finances and financial obligations is that, during the

second quarterly meeting of 1990, Mr. Thompson ordered a cash distribution of system profits to the system's owners commensurate with their respective ownership interests.[17] All funds derived from operation of the cellular facilities are deposited directly into ETC's separate bank account, to which Mr. Thompson has full access, and Amcell's management fees are paid out of that account.[18] Although TDS stresses Amcell's ability to extend unilaterally the term of its management contract with Thompson up to twenty years, Amcell notes that it, like any system manager, is subject to dismissal for cause at any time. As to TDS' argument that Mr. Thompson lacks the ability to exercise his ultimate authority for managing the Atlantic City cellular system because his profession does not qualify him to operate a cellular system, Amcell responds that TDS' argument is without merit, citing *Delray Cellular Associates*, 3 FCC Rcd 5162 (1988) (*Delray*). In *Delray*, the Commission found that the occupations of a licensee's principals are of "no decisional relevance" because no facts were raised concerning the licensee's inability to participate in or make satisfactory arrangements to ensure efficient development of the cellular system. *Id.* at 5163 n.5. Amcell concludes that, in light of the foregoing facts, it is clear that Mr. Thompson controls the Atlantic City cellular system and that there has been no transfer of control to Amcell.

14. Section 310(d) of the Communications Act of 1934, as amended, (the Act) prohibits any transfer of control of a radio station licensee without prior Commission approval. 47 U.S.C. Section 310(d). This prohibition pertains to *de jure* and *de facto* control. *See Lorain Journal Co. v. F.C.C.*, 351 F.2d 824, 828 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). The issue at hand is whether Thompson prematurely relinquished *de facto* control of the Atlantic City cellular radio licensee to Amcell. A determination of whether a transfer of *de facto* control has occurred requires that the Commission consider the totality of the circumstances to ascertain where actual control resides. *See, e.g., Stereo Broadcasters, Inc.*, 55 FCC 2d 819 (1975). In *Cellular Control Notice, supra*, six indicia of control were set forth, based directly on the Commision's decision in *Intermountain Microwave*, 24 RR 983, 984 (1963). The six indicia or factors to be considered are: (1) Does the licensee have unfettered use of all facilities and equipment? (2) Who controls daily operations? (3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission? (4) Who is in charge of employment, supervision, and dismissal of personnel? (5) Who is in charge of the payment of financing obligations, including expenses arising out of operating? and (6) Who receives monies and profits from the operation of the facilities?

15. We now apply the foregoing criteria to the facts presented in this case. *Use of the facilities*. Except for the shared Amcell switch, Ellis Thompson Corporation (ETC) owns all the cellular equipment utilized in the Atlantic City system and is the lessee for all of the cell sites. Mr. Thompson also has access to the shared switch. Thus, it is clear that ETC, the licensee, has unfettered access to the system's facilities and equipment. Indeed, Mr. Thompson makes regular visits to the system. *Day-to-Day Operations*. While Amcell does manage day-to-day operations, such operations are subject to Mr. Thompson's ultimate supervision and control. Mr. Thompson approves the annual budget and major expenditures, receives periodic reports detailing the status of operations and maintains regular contact with the Amcell management team.[19] *Policy Decisions*. Mr. Thompson is involved in making all major policy decisions and meets quarterly with Amcell management to discuss all aspects of the business over the past quarter and to discuss marketing and construction plans for the current quarter. While Amcell prepares FCC applications, they are reviewed by Mr. Thompson's independent FCC counsel, signed by Mr. Thompson and filed by his counsel. *Personnel Responsibilities*. Mr. Thompson is ETC's only employee and determines his own salary, which is paid by ETC. Although Amcell is ETC's system manager and thus is responsible for hiring, firing and supervising personnel on a daily basis, Amcell itself is subject to dismissal for cause by ETC, which thus has the ultimate responsibility for personnel management. *Financial Obligations*. ETC is financially responsible for the construction and operation of the Atlantic City cellular system. ETC is liable on the loan from Provident Bank which has been used to meet the financial needs of the system.[20] Moreover, while Amcell has authority to make payments on behalf of ETC for operating expenses, Mr. Thompson must approve the annual budget for the system, any proposed expenditures outside the scope of the annual budget, and all checks in excess of $5,000, except for certain recurring payments for which the limit is $25,000. *Receipt of monies*. All funds derived from operation of the cellular system are deposited directly into ETC's separate bank account, to which Mr. Thompson has full access, and Amcell's management fees are paid out of that account. As majority owner, Mr. Thompson is ultimately entitled to 50.01 percent of the cellular system's proceeds. During the second quarterly meeting of 1990, Mr. Thompson ordered a cash distribution of system profits to the system's owners, commensurate with their respective ownership interests.

16. In light of the foregoing discussion, we find that Mr. Thompson has substantially maintained the normal indicia of control of the Atlantic City cellular system and that it is therefore not necessary to abrogate any of the agreements between Amcell and Mr. Thompson which have been discussed above.

IV. ORDERING CLAUSE

17. For the foregoing reasons, IT IS ORDERED that the application for review and the "Supplement to Application for Review" filed by Telephone and Data Systems, Inc. and United States Cellular Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Mr. Thompson was the initial permittee. On November 21, 1988, the staff granted the *pro forma* assignment of the construction permit from Ellis Thompson to Ellis Thompson Corporation, an Oregon corporation of which Mr. Thompson is the sole shareholder at the current time. Pursuant to a settlement agreement entered into by Mr. Thompson and other non-wireline applicants in the Atlantic City Metropolitan Statistical Area, Mr. Thompson is entitled to a 50.01 percent ownership interest in

the Atlantic city cellular authorization, while other parties are entitled to a 49.99 percent ownership interest in that authorization. The future ownership interests of the licensee are the subject of court litigation.

[2] TDS filed a motion in which it requested that its application for review be accepted for filing even though it was filed late. The final day for filing applications for review of the *Bureau Order* was Friday, April 28, 1989. TDS filed its application for review on Monday, May 1, 1989, when it became aware that it had miscounted the days within which to file its pleading. It delivered copies of its pleading to the other parties in this proceeding on May 1, 1989, the same day they would have received copies by mail if mailed the previous Friday. Thus, it does not appear that any prejudice to any party or any harm to our processes would result from our acceptance of the late-filed pleading. *See, e.g., Noble Syndications, Inc.*, 46 RR 2d 511, 515 (1979). Therefore, TDS' motion is granted.

[3] On April 17, 1991, TDS filed a petition for leave to file the Supplement. TDS claims that it has obtained documents as a result of civil litigation involving Amcell, TDS and Thompson, which demonstrate that Amcell has obtained *de facto* control over Thompson's cellular system. TDS notes that it did not learn about those documents prior to September 1990 and that Amcell has sought to keep the existence of those documents a secret. Although there are questions regarding the exact time that TDS obtained some of these documents and whether TDS' Supplement is a timely formal pleading, we shall consider the arguments stated therein as informal objections because they articulate potentially serious transfer of control questions.

[4] On March 5, 1992, TDS filed a "Request for an Inquiry under Section 403 of the Communications Act" (Request) in which it argues that if, for procedural reasons, the Commission does not consider the arguments raised in its Supplement filed April 17, 1991, the Commission should conduct an inquiry under Section 403 of the Communications Act to determine whether Amcell has assumed *de facto* control of the Atlantic City system licensed to Thompson and whether Amcell and Thompson have attempted to conceal that control from the Commission. Since we have considered TDS's arguments articulated in its Supplement, it is unnecessary to conduct the inquiry requested by TDS. Therefore, TDS's Request is dismissed as moot.

[5] Copies of this agreement and amendments thereto are contained in Appendices I, IV and V to TDS' Supplement.

[6] TDS includes a copy of this agreement in Appendix II of its Supplement and an amendment thereto in Appendix IV of its Supplement.

[7] TDS includes a copy of this amendment in Appendix III of its Supplement.

[8] Amcell asserts that it owns 36 percent of the licensee at this point. *See* page 14 of the "Opposition to TDS Request for an Inquiry under Section 403 of the Communications Act," filed April 1, 1992, by Amcell and Comcast Cellular Communications, Inc.

[9] Amcell cites *Miller Communications, Inc.*, 3 FCC Rcd 6477, 6479 (Mob. Serv. Div. 1988) and *Turner Broadcasting System, Inc.*, 101 FCC 2d 843, 849 (1985) to support this proposition.

[10] *See* paragraph 4 of the Declaration of Anna E. Hillman, filed as Exhibit 1 to Amcell's Opposition to TDS' Supplement. Ms. Hillman is Vice President and Controller of Amcell d/b/a Comcast Cellular and its subsidiary Amcell of Atlantic City, Inc. (collectively "Amcell"). She is responsible for the supervision of Amcell's management contract with respect to Thompson's non-wireline cellular system in Atlantic city.

[11] *Id.*

[12] *Id.* at paragraphs 5-7.

[13] *Id.* at paragraphs 5-8.

[14] *Id.* at paragraph 10.

[15] *Id.* at paragraphs 11-12.

[16] *Id.* at paragraph 13.

[17] *Id.* at paragraph 14.

[18] *Id.* at paragraph 15.

[19] As explained in paragraph 8, *supra*, Amcell and Mr. Thompson entered into an Indemnity Agreement on December 30, 1987, which currently provides that Amcell will pay Mr. Thompson $1,500,000 if his cellular authorization is revoked as a proximate result of an agreement between Thompson and Amcell, pursuant to which Amcell contracted to construct and maintain his cellular system. The Indemnity Agreement was entered into prior to our ruling invalidating paragraph 16 of the option agreement between TDS, USCC and Mr. Thompson, which provides, *inter alia*, for the sale of Thompson's controlling interest to USCC. Paragraph 16 of the TDS option agreement gives USCC veto power over all agreements worth $50,000 or more. (*See* paragraph 2, *supra*). Further, paragraph 16 of the TDS option agreement is still the subject of court litigation. We find the Indemnity Agreement somewhat disquieting because it provides that Mr. Thompson will receive a large amount of money even if his license is revoked. This agreement necessarily encourages a lax attitude on the licensee's part, even though Thompson has an option to sell his cellular system for $6,000,000 to Amcell. (*See* paragraph 6, *supra*). Nevertheless, the preponderance of the facts and circumstances of this case indicate that Mr. Thompson has not relinquished control of the Atlantic City cellular system.

[20] In light of this fact, Amcell's willingness to lend Thompson money to make capital contributions to any new entity which might become the licensee of the Atlantic City cellular system (see footnote 1 and paragraph 7, *supra*) has no decisional significance. Thus, the bank loan has provided whatever funds have been required to construct and operate Thompson's cellular system.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-259

In the Matter of

Amendment of Section 73.202(b),	RM-5892
Table of Allotments,	RM-6292
FM Broadcast Stations.	RM-6463
(Faribault, Blooming Prairie,	RM-6464
Northfield and New Prague,	
Minnesota)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 10, 1992; Released: June 19, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration of the *Report and Order* ("*R&O*") in this proceeding, 4 FCC Rcd 7506 (1989), filed by KYMN, Inc., ("petitioner") licensee of daytime-only Station KYMN(AM), Northfield, Minnesota. Petitioner requests that the Commission reconsider its decision allotting Channel 298C2 to Faribault, Minnesota, instead of FM Channel 298C2 to Northfield, Minnesota. Petitioner also filed a Motion for Stay of the effective date of the Faribault allotment and the opening of the filing window for that channel.[1] Blooming Prairie Development Corporation ("BPDC"), proponent of Channel 265A at Blooming Prairie, Minnesota, filed comments in response to the petition for reconsideration and to the motion for stay.[2] Richard Johnson ("Johnson") filed an opposition and a petition for leave to file the opposition.[3] Petitioner filed an opposition to Johnson's procedural request and also submitted reply comments.

BACKGROUND

2. In the *Notice of Proposed Rule Making*, 3 FCC Rcd 3702 (1988), in this proceeding, we proposed two mutually exclusive allotments. First, we proposed to substitute Channel 298C2 for Channel 240A at Faribault, Minnesota, in response to a request by KDHL, Inc., the licensee of Station KDHL, Channel 240A, Faribault.[4] Second, we proposed the allotment of Channel 299A to Blooming Prairie, Minnesota. In response to the *Notice*, a counterproposal was filed by Kingsley H. Murphy, Jr., requesting the substitution of Channel 239A for Channel 238A at New Prague, Minnesota, and modification of his construction permit for Station KCHK(FM) at New Prague to specify operation on the higher powered channel. Another counterproposal was filed by KYMN, Inc., requesting the allotment of Channel 298C2 to Northfield, Minnesota, as that community's first FM broadcast service. In the alternative, KYMN requested the allotment of Channel 298A or Channel 297A at Northfield.

3. In the *R&O*, we took three actions. First, we searched for alternative FM channels that would eliminate conflicts among the proposals filed in this proceeding and found only one such channel. As a result, we allotted Channel 265A in lieu of Channel 299A to Blooming Prairie which eliminated the conflict between the Blooming Prairie and Northfield proposals. Second, we dismissed the New Prague proposal because it was dependent upon the deletion of Channel 240A at Faribault which we determined

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[1] In view of our action herein denying KYMN's petition for reconsideration, its motion for stay will be dismissed as moot. Also, by *Memorandum Opinion and Order* in MM Docket No. 91-163, FCC 91M-3456 (released December 17, 1991), an Administrative Law Judge approved settlement and merger agreements among the competing applicants for Channel 298C2 at Faribault and granted the application of Faribault Broadcasting, Inc., as amended, to operate on Channel 298C2. KYMN, Inc. had been one of the applicants for Channel 298C2 at Faribault, but its application was dismissed because it had not filed a notice of appearance or paid its hearing fee. *See Memorandum Opinion and Order* in MM Docket No. 91-163, FCC 91M-2648 (released August 28, 1991).

[2] In BPDC's comments it took no position on whether Faribault or Northfield should receive the Channel 298C2 allotment. Rather, BPDC seeks the expeditious opening of the filing window for Channel 265A at Blooming Prairie. Inasmuch as the filing window for Channel 265A was opened on May 5, 1992, and closes on June 4, 1992, BPDC's comments are moot. *See Public Notice*, Report No. FM RM-11, Mimeo No. 22936, released May 5, 1992.

[3] We will deny Johnson's petition for leave to file an opposition and will dismiss the opposition as late filed. Specifically, the opposition was filed on February 2, 1990, while the deadline for filing oppositions was January 8, 1990. Although Johnson contends that the late filing is justified by his initial confusion regarding the procedural dates for filing oppositions, his recently retained counsel's temporary absence over the Christmas holidays, and the alleged lack of service of pleadings, we do not agree. It is well settled that counsel's vacation schedule does not constitute sufficient justification for missing the filing deadline. *See Olive Branch, MS*, 4 FCC Rcd 7884 (1989). Furthermore, although parties are encouraged to serve petitions for reconsideration on other parties to rulemaking proceedings, they are not required to do so because the notice of the filing of a reconsideration petition in a rulemaking proceeding is printed in the Federal Register. *See* 47 C.F.R. § 1.429(e). In any event, petitioner states that the petition for reconsideration and motion for stay were served on Johnson as set forth in the certificates of service attached to those documents, and in an affidavit, Richard Johnson states that he received a copy of the petition for reconsideration and motion for stay in late November, 1989.

[4] Although KDHL, Inc. also requested modification of its license to specify operation on Channel 298C2 at Faribault, we did not propose to modify KDHL's license because another party, Richard Johnson, had filed a rulemaking petition to allot Channel 298C2 to Faribault. Under these circumstances, when there are two expressions of interest in a nonadjacent channel upgrade and there are no additional equivalent class channels available for allotment to the community, Commission policy precludes a license modification. *See Modification of FM and*

was not possible at that time.[5] Third, using the FM allotment priorities,[6] we made a comparison between the Northfield and Faribault proposals.

4. Since neither the allotment to Faribault nor to Northfield would fulfill any of the first three allotment priorities, a comparison of the communities under Priority 4 (other public interest matters) was made. Under Priority 4, we considered such factors as location, population and reception services. We determined that the public interest would best be served by allotting Channel 298C2 to Faribault as that community's second FM service instead of to Northfield. In comparing the two communities, we noted that the gain in diversity of media voices would be significantly greater from an allotment to Faribault because of its larger population and consequent need for diversity. We noted that Faribault, with a population of 16,241, had fewer full time reception services (5 services) than Northfield with a population of 12,562 (8 services).

PETITION FOR RECONSIDERATION

5. Petitioner contends in its petition that the Commission failed to apply longstanding Commission precedent and to justify why Northfield should not be preferred over Faribault. Petitioner argues that the Commission erroneously based its decision in the *R&O* upon the number of received full-time services in each community. Petitioner further argues that the number of received services within each community provides no basis for a decision since both communities will have an additional received full-time service as a result of the allotment.

6. Petitioner asserts that Commission precedent requires the allotment to Northfield be based on the lack of full-time local service, citing the Commission's action in *Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88 (1982). Petitioner contends that Northfield is an underserved community due to its lack of a full time local service and is deserving of the FM allotment, citing *FM Broadcast Stations,* 53 RR2d 1550, 1556 (1983). Petitioner further asserts that the comparison between Northfield and Faribault is almost identical to the comparison the Commission undertook in *Warren and Niles, Ohio,* 59 RR2d 1179 (1986). Petitioner notes that in *Warren and Niles,* the Commission stated "the most important factor of availability of local service...provides...a clear choice". *See* 59 RR2d at 1183.[7] Petitioner contends that where the factor of availability of local broadcast service provides a clear choice, the traditional criteria such as population growth, relative sizes of the communities or reception of other services are not of sufficient importance on which to base a comparative decision between the communities, citing *Washington and Wilmington, North Carolina,* 51 RR2d 1297, 1299 (1982). Petitioner argues that here the availability of local broadcast service provides the clear choice. Specifically, petitioner asserts that the addition of an FM channel to Northfield would provide the first full-time local service, the first local night-time service and a second competitive voice for the expression of diversified programming, while the addition of the FM channel to Faribault has provided only a third full-time competitive outlet in the community.

7. Lastly, petitioner notes that Northfield has had greatly expanding population since 1970, while the City of Faribault has remained stagnant. The City of Northfield has increased in population from 10,235 persons in 1970 to 14,036 persons in 1988. In comparison, Faribault has decreased in population from 16,595 persons in 1970 to 16,308 persons in 1988. Petitioner further contends, based upon estimates by the Community Development Director of Northfield, that Northfield will have 500 more persons than Faribault in the year 2000.

8. In its reply comments, petitioner points out that there was only one valid response filed to its petition. KYMN further notes that BPDC took no position on the Channel 298C2 allotment to Faribault but instead sought the expeditious opening of the window for Channel 265A at Blooming Prairie. Petitioner argues that since there is now no opposition to the allotment of Channel 298C2 to Northfield, the Commission should grant its petition for reconsideration.

DISCUSSION

9. After carefully reviewing the arguments raised by the petitioner, we believe that the gravamen of its petition is that in comparing the relative needs of Northfield and Faribault, Minnesota, for a new FM allotment, the *R&O* did not properly follow Commission precedent because it failed to take into account the number of local transmission services in the two communities. We agree that this matter warrants further analysis. However, we note that since the *R&O* was adopted in this proceeding, the Commission changed the manner in which transmission and reception service analyses are considered in comparing communities under Section 307(b) of the Communications Act of 1934, as amended. Specifically, in *Valley Broad-*

TV Station Licenses, 98 FCC 2d 916 (1984). Rather, we would afford all interested parties the opportunity to apply for the upgraded channel.

[5] Specifically, Channel 240A at Faribault could not be deleted because it is occupied by Station KDHL-FM and could not be removed until Station KYMN vacated the channel. However, as explained in note 4 *supra,* Station KDHL could not move to Channel 298C2 at Faribault because there were multiple expressions of interest in that channel and there were no additional equivalent class channels available for allotment to that community. As a result, Station KDHL's only option would be to apply for Channel 298C2 at Faribault.

[6] These priorities are: (1) first full-time aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88 (1982).

[7] Warren had a population of 56,629 persons and had licensed to it an AM fulltime station and an AM daytime station. Niles had a population of 23,088 and had licensed to it only a daytime-only AM station. The Commission noted that Warren was slightly farther from the metropolitan area of Youngstown than was Niles. The Commission did not consider received services at all, however, but held that the factor of availability of local service provided a clear basis for comparing the communities. Holding that neither the larger population of Warren nor its status as a county seat outweighed the benefits accruing from the provision of first full-time local service, the Commission allotted the available FM channel to Niles finding that there was not a comparatively greater need for a third service at Warren over a second service at Niles.

casters, Inc., 5 FCC Rcd 2785 (1990), the Commission reversed longstanding precedent and decided that in comparing the number of local transmission services in communities, noncommercial educational stations should now be considered because there is no longer a legitimate public interest purpose in exempting all noncommercial stations from transmission service analysis. In making this determination, the Commission noted that the rules regarding noncommercial FM stations had changed over the years and that noncommercial stations are now subject to an issue-responsive programming rule that is essentially identical to that applicable to commercial radio stations. Likewise, for essentially the same reasons, in *Channel 32 Broadcasting Company*, 6 FCC Rcd 5188 (1991), the Commission determined that noncommercial educational stations should also be included for purposes of comparing the number of aural reception services in different communities. As a result, and consistent with past Commission and court precedent, we will recompare the needs of Faribault and Northfield in light of the Commission's recent policy changes in this area. *See, e.g., Arnold L. Chase*, 5 FCC Rcd 1642 (1990), *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d (D.C. Cir. 1987); and *Washington Association for Television and Children v. FCC*, 665 F.2d 1264 (D.C. Cir. 1981)

10. In making this comparison, we are guided by the allotment priorities set forth in *Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), which are:

(1) first full-time aural service;

(2) second full-time aural service;

(3) first local service;

(4) other public interest matters.

(Co-equal weight given to priorities (2) and (3).)

In examining the conflicting proposals for Faribault and Northfield, we find that no first or second fulltime aural service would be provided because the communities and surrounding areas already receive two or more fulltime aural services. Since both communities already have local radio service neither proposal will provide a first local service under priority three. Therefore, in light of the above, we believe it is appropriate to base our determination on which proposal should prevail under priority (4) of the allotment criteria, other public interest matters.

11. Priority (4) provides considerable flexibility in considering a variety of factors. The Commission in adopting the new priorities specifically stated that a comparison under Priority (4) "can take into account the number of aural services received in the proposed service area, the number of local services, the need for or lack of public radio service and other matters such as the relative size of the proposed community and their growth rate."

12. In applying these factors, we believe that Channel 298C2 should be allotted to Faribault because it has a larger population than Northfield, has fewer local transmission services than Northfield, and receives fewer aural services than Northfield. Specifically, we note that, according to the 1990 U.S. Census, the population of Faribault is 17,085 while the population of Northfield is 14,684. Second, by taking into account both commercial and noncommercial educational radio stations, we find that Faribault has two local transmission services while Northfield has three, two of which are full-time stations.[8] Third, we have conducted a new analysis of aural reception services in the communities and determined that Faribault receives 10 radio services while Northfield receives 14. Under these circumstances, we believe that the larger community of Faribault has a greater need for a new FM allotment.

13. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 204(b), and 0.284 of the Commission's Rules, IT IS ORDERED That the Petition for Reconsideration filed by KYMN, Inc. IS DENIED.

14. IT IS FURTHER ORDERED, That the Motion for Stay filed by KYMN, Inc. IS DISMISSED.

15. IT IS FURTHER ORDERED That the Petition for Leave to File Opposition IS DENIED.

16. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[8] There was also a fourth local radio station in Northfield, Station WCAL(AM), but its license was cancelled and its call letters were deleted on December 16, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-127

In the Matter of

Amendment of Section 73.202(b), RM-7917
Table of Allotments,
FM Broadcast Stations.
(Germantown, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 10, 1992; Released: June 22, 1992

Comment Date: August 13, 1992
Reply Comment Date: August 28, 1992

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Omni Broadcasting Corporation ("petitioner"), permittee of Channel 298A, Germantown, Tennessee, requesting the substitution of Channel 298C3 for Channel 298A at Germantown and modification of petitioner's authorization to specify operation on the higher powered channel. Petitioner states it will apply for the channel, if allotted. Petitioner filed a supplement to its petition for rule making.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 298C3 for Channel 298A, since it could provide the community with a wide coverage area FM service. Channel 298C3 can be allotted to Germantown in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.6 kilometers (11.6 miles) southeast to accommodate petitioner's desired site.[2] As requested, we also propose to modify petitioner's authorization to specify operation on Channel 298C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Germantown or require petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Germantown, Tennessee	231C2, 298A	231C2, 298C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 13, 1992,** and reply comments on or before **August 28, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Harold K. McCombs, Jr., Esq.
Holland & Knight
888 17th Street, N.W.
Suite 900
Washington, D.C. 20006-3939
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

[1] Petitioner advises that the Commission has adopted a *Memorandum Opinion and Order* in MM Docket No. 88-429, *Eugene Walton,* FCC 92-218 (Released May 28, 1992), affirming the Review Board's Decision, which granted petitioner's application to construct and operate a FM station on Channel 298A at Germantown, Tennessee.

[2] The coordinates for Channel 298C3 at Germantown are North Latitude 34-56-28 and West Longitude 89-42-29.

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-128

In the Matter of

Amendment of Section 73.202(b), RM-8002
Table of Allotments,
FM Broadcast Stations.
(South Hill and Lawrenceville, Virginia)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: June 10, 1992; Released: June 18, 1992

Comment Date: August 10, 1992
Reply Comment Date: August 25, 1992

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Old Belt Broadcasting Corporation ("petitioner"), licensee of Station WSHV-FM, requesting the exchange of channels between Station WSHV-FM, Channel 288A, South Hill, Virginia, and Station WHFD-FM, Channel 255A, Lawrenceville, Virginia, and the modification of the authorizations of both stations, accordingly. Petitioner states that it will apply for Channel 255A at South Hill and will also reimburse the permittee of Station WHFD-FM for the reasonable costs associated with the change in channel at Lawrenceville, Virginia. William Carlton Link, permittee of Station WHFD-FM, filed comments conveying his opposition to exchanging channels with petitioner.

2. In support of its proposal, petitioner advises that both stations are precluded from operation with 6 kilowatts power on their present channels due to other existing or proposed FM stations. Petitioner asserts the proposed exchange of channels will enable both stations to increase the power of their respective stations to 6.0 kilowatts, resulting in large gains in areas and populations receiving FM services in the South Hill and Lawrenceville areas. Petitioner also states that no community would lose any present or potential FM service.

3. We believe the public interest would be served by proposing the the exchange of channels between Station WSHV-FM, South Hill, and Station WHFD-FM, Lawrenceville, Virginia, since it could provide both communities with an improved FM service. Channel 255A can be allotted to South Hill and Channel 288A can be allotted to Lawrenceville, Virginia, in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter sites specified in Station WSHV-FM's and Station WHFD-FM's authorizations, respectively.[1] Therefore, we will direct an *Order to Show Cause* to the permittee of Station WHFD-FM why its construction permit should not be modified to specify operation on Channel 288A in lieu of Channel 255A. Petitioner will be required to reimburse the permittee of Station WHFD-FM for the reasonable costs of moving to Channel 288A if this proposal is ultimately adopted.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
South Hill, Virginia	288A	255A
Lawrenceville, Virginia	255A	288A

5. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, William Carlton Link, permittee of Station WHFD-FM, Lawrenceville, Virginia, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 288A as proposed herein instead of the present Channel 255A.

6. Pursuant to Section 1.87 of the Commission's Rules, William Carlton Link, may not later than **August 10, 1992,** file a written statement showing with particularity why its construction permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on William Carlton Link to furnish additional information. If William Carlton Link raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, William Carlton Link will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the William Carlton Link, Route 1, Box 16, Highway 58 East, Lawrenceville, Virginia, 23868 (permittee of Station WHFD-FM).

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

[1] The coordinates for Channel 255A at South Hill are North Latitude 36-44-39 and West Longitude 78-09-42. The coordinates for Channel 288A at Lawrenceville are North Latitude 36-45-10 and West Longitude 77-51-49.

9. Interested parties may file comments on or before **August 10, 1992,** and reply comments on or before **August 25, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Earl R. Stanley, Esq.
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Washington, D.C. 20006
(Counsel for petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-547

In the Matter of

Amendment of Section 73.202(b),	RM-6899
Table of Allotments,	RM-7021
FM Broadcast Stations.	RM-7100
(Hannahs Mill and Milledgeville, Georgia)	RM-7102

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 4, 1992; Released: June 18, 1992

By the Chief, Policy and Rules Division:

1. Before the Commission is a Petition for Reconsideration of the *Report and Order* ("R&O") in this proceeding, 6 FCC Rcd 3753 (1991), filed by Radio Georgia, Inc. ("RGI").[1] The *Report and Order* granted a petition for rule making filed by Dewitt Coleman ("Coleman"), which proposed an allotment of Channel 266A to Hannahs Mill, Georgia, as that community's first local FM service. The R&O also granted a petition filed by Preston W. Small ("Small") for a substitution of Channel 264C3 for Channel 264A at Milledgeville, Georgia, and modification of his construction permit for Station WLRR(FM). RGI requests reconsideration only of that portion of the R&O which made the allotment of Channel 266A to Hannahs Mill.[2] RGI filed a Request to File Supplement and a Supplement to the Petition for Reconsideration.[3] No opposition or other reply comments were filed in response to RGI's petition for reconsideration.

2. *Background.* This proceeding originated with three separate petitions for rule making. Sam V. Stacey, Jr. ("Stacey") requested the allotment of Channel 264A to Hannahs Mill and Dewitt Coleman ("Coleman") requested the allotment of Channel 266A to Hannahs Mill. Radio Perry, licensee of Station WPGA, Channel 265A, Perry, Georgia requested the substitution of Channel 265C3 for Channel 265A, and modification of its construction permit to reflect the higher powered channel.[4] The *Notice of Proposed Rule Making* ("*Notice*") sought comments on these mutually exclusive proposals.

3. In response to the *Notice*, Preston Small filed a petition requesting substitution of Channel 264C3 for Channel 264A, Milledgeville, Georgia and modification of his construction permit for Station WLRR to reflect the higher powered channel. Small's petition was mutually exclusive to the proposed allotment of Channel 264A to Hannahs Mill and was therefore treated as a counterproposal. Hannahs Mill Broadcasting and Coleman filed supporting comments. David L. Piper, the President of RGI, and several other parties filed reply comments.

4. Piper contended that Hannahs Mill is not a community for allotment purposes, but instead functions as a part of Thomaston, Georgia. He asserted that Hannahs Mill is a rural road and is more than 50% enclosed within the urban area boundary of Thomaston. Piper offered his testimony as a resident of 35 years, as well as that of the county sheriff, a resident of 18 years, that Hannahs Mill has never been referred to as a community. Piper stated that Hannahs Mill has no government, appointed officials, police, fire department, school, post office, commercial or cultural center. Piper claimed that the only buildings on Hannahs Mill Road are the New Hope Baptist Church, the Kountry Corner Grocery and the old Hannahs Mill. In response, Coleman noted that Hannahs Mill is a Census Designated Place ("CDP") with a 1980 U.S. Census population of 2,626. Therefore, he claimed, there is a strong presumption that Hannahs Mill is a community for allotment purposes.

5. The R&O allotted Channel 266A to Hannahs Mill. The R&O noted that Hannahs Mill is a CDP and is listed in the *Rand McNally Commercial Atlas* as a separate community. Relying on *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), the R&O stated that there is a strong presumption that a CDP is a community for allotment purposes. Although Hannahs Mill relies on Thomaston for many of its local services, the R&O noted that the Commission has held that a municipality need not provide every public service on its own to merit community status. The R&O also substituted Channel 264C3 for Channel 264A, Milledgeville, Georgia, as requested by Small.

6. *Petition for Reconsideration.* RGI asserts that the Commission erred in making an allotment to Hannahs Mill. RGI argues that the evidence Piper provided rebutted the presumption of community status, and notes that none of the proponents of the allotments rebutted Piper's claims. RGI relies on *East Hemet et. al., California*, 4 FCC Rcd 7895 (1989), as a similar case where a community, although designated as a CDP, was found not to be a community for allotment purposes. RGI states that *East Hemet* is directly on point with the instant case, and therefore the allotment at Hannahs Mill should be deleted. In the Supplement RGI also relies on *Crossville and Hilham, Tennessee*, 6 FCC Rcd 6636 (1991), which affirmed that a listing in *Rand McNally Commercial Atlas* indicating mere geographical location is not sufficient to establish community status.

7. *Discussion.* The R&O allotted Channel 266A to Hannahs Mill primarily because of the listing of Hannahs Mill as a CDP. However, according to the 1990 U.S.

[1] Public notice of the filing of RGI's petition was given on February 21, 1992, 57 Fed. Reg. 6225, Report No. 1878.

[2] Small filed a Request for Ruling that the Commission affirm that part of the *Report and Order* which granted the substitution at Milledgeville. This request is moot in light of our actions herein.

[3] The supplement notes a case regarding community status that was decided after the *Report and Order* in this proceeding. Since this proceeding is uncontested, we will consider the supplemental comments.

[4] Lowell L. Register, President of Station WPGA(FM), withdrew his proposal prior to the end of the comment period. Therefore, that request was not considered in the *Report and Order*.

Census, Hannahs Mill is no longer designated as a CDP. Where the alleged community is not a CDP, and community status is at issue, the proponent must provide adequate information to establish that such a place is a geographically identifiable population grouping. The showing may be made by testimony of local residents or by objective indications of whether the residents of such area function as and conceive of themselves as residents of a specific "community." Examples include commercial, political, social and religious organizations which serve and are supported by the community.[5] [6]

8. By providing information regarding the lack of commercial, political and social organizations, as well as the testimony of the county sheriff, Piper offered evidence to rebut the community status of Hannahs Mill. In the absence of any evidence in support of community status, and in view of the fact that Hannahs Mill is no longer a CDP, we have determined that Hannahs Mill is not a community for allotment purposes. For these reasons we will grant the request of RGI and will delete the allotment made to Hannahs Mill.[7]

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 3, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Hannahs Mill, Georgia	----

10. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Radio Georgia, Inc. IS GRANTED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[5] *Semora, North Carolina,* 5 FCC Rcd at 935.

[6] While we realize that we did not request information regarding the community status of Hannahs Mill in the *Notice,* we believe that proponents of the allotment had adequate opportunity to respond to this issue in response to Piper's reply comments and in response to RGI's petition for reconsideration.

[7] We note that no applications have been filed for Channel 266A at Hannahs Mill. The filing window for Hannahs Mill closed on September 12, 1991 and no other applications have been received on a first come first serve basis.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-75

In the Matter of

Amendment of Section 73.202(b),	RM-6556
Table of Allotments,	RM-6629
FM Broadcast Stations.	
(Casa Grande, Claypool, Kearny and Marana, Arizona)[1]	

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1992; Released: June 18, 1992

By the Chief, Policy and Rule Division:

1. The Commission has before it a Petition for Reconsideration filed by Phyllis Ehlinger, and a Petition for Partial Reconsideration filed by Kenyon Communications,[2] both directed to the *Report and Order* in this proceeding. 5 FCC Rcd 157 (1990). Video Communications and Radio, Inc. filed Oppositions against the Petition for Reconsideration and the Petition for Partial Reconsideration. Desert West Air Ranchers Corporation filed an Opposition to the Petition for Reconsideration. Ruth and Willard Shoecraft d/b/a Claypool Broadcasting Company filed "Comments on Petition for Reconsideration and Request for Severance of Proceeding." Kenyon Communications filed a Consolidated Reply to the Oppositions. For the reasons discussed below, we dismiss both the Petition for Reconsideration filed by Phyllis Ehlinger and the Petition for Partial Reconsideration filed by Kenyon Communications.

Background

2. This proceeding began with the filing of two separate petitions for rule making. The first petition for rule making was filed by Video Communications and Radio, Inc. ("VCRI"), licensee of Station KFAS (formerly KBBT), Channel 288A, Casa Grande, Arizona, proposing the substitution of Channel 288C2 for Channel 288A at Casa Grande, and the modification of the Station KFAS license to specify operation on Channel 288C2. The second petition for rule making was filed by Desert West Air Ranchers Corporation ("Desert"), permittee of Station KCDX, Channel 286A, Kearny, Arizona, proposing the substitution of Channel 287C2 for Channel 286A at Kearny and modification of the Station KCDX construction permit to specify operation on Channel 287C2. In order to accommodate either proposal, it was also necessary for both parties to propose the substitution of Channel 291A for Channel 288A at Claypool, Arizona.

3. The *Notice of Proposed Rule Making* in this proceeding, 5 FCC Rcd 157 (1990), consolidated these proposals due to the short-spacing between these two upgrade proposals. In addition to proposing these conflicting upgrade proposals, the *Notice* also observed that a 17.7 kilometer west site restriction on the Channel 288C2 upgrade at Casa Grande would remove the conflict and enable us to grant both upgrades. In response to the *Notice*, Phyllis Ehlinger ("Ehlinger") filed a counterproposal proposing the allotment of Channel 287A to Marana, Arizona, as a new service.

4. The *Report and Order* in this proceeding upgraded the allotments at Casa Grande and Kearny, and modified the Station KFAS license to specify operation on Channel 288C2 and the Station KCDX construction permit to specify operation on Channel 287C2. In regard to the proposed site restriction on the Channel 288C2 allotment at Casa Grande, this site restriction was increased from the 17.7 kilometers set forth in the *Notice* to 23.7 kilometers.[3] In order to accommodate these upgraded allotments, the *Report and Order* substituted Channel 291A for Channel 288A at Claypool, Arizona, and permitted the two applicants for that allotment to amend their applications without loss of cut-off protection.[4] Finally, the *Report and Order* dismissed the Ehlinger counterproposal due to short-spacings with the authorized facilities of Station KFAS and Station KCDX.

Kenyon Communications Petition for Partial Reconsideration and Motion for Leave to File Late-Filed Petition for Partial Reconsideration

5. At the time of the filing of the Petition for Partial Reconsideration on March 7, 1990, Kenyon Communications ("Kenyon") was the licensee of Station KTIM-FM, Channel 287C2, in Wickenburg, Arizona.[5] We are dismissing the Kenyon Petition for Partial Reconsideration because it is untimely. Section 405 of the Communications Act of 1934, as amended, requires that petitions for reconsideration be filed within 30 days.[6] The *Report and Order* in this proceeding was published in the Federal Register on January 26, 1990.[7] As such, it would have been necessary for Kenyon to have filed its Petition for Partial Reconsideration by February 27, 1990.

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[1] The community of Marana, Arizona, has been added to the caption.

[2] Kenyon Communications has also filed a "Motion for Leave to File Late-Filed Petition for Reconsideration." Desert West Air Ranchers Corporation filed an Opposition to this Motion, and Kenyon Communications filed a Reply to the Opposition.

[3] The alternate site for Casa Grande was proposed by Desert in order to accommodate its alternate site for the upgrade at Kearny. VCRI did not interpose any objection to either of the alternate sites proposed for its upgrade at Casa Grande.

[4] Claypool Broadcasting Company ("CBC") is now the permittee of the Channel 291A allotment at Claypool. In its Comments, CBC notes that its Channel 291A allotment does not conflict with any proposal in this proceeding. Therefore, CBC requests that the substitution in Claypool be severed from the proceeding so that it can commence construction. In view of our actions disposing of the Petitions for Reconsideration, there is no longer any impediment to CBC going forward with construction and its request for severance need not be considered.

[5] The license was subsequently assigned to Interstate Broadcasting System of Arizona, Inc. and the call letters of Station KTIM-FM were changed to KRDS-FM.

[6] *See also* Section 1.429(d) of the Commission's Rules.

[7] 55 FR 2664.

6. In order to dismiss the Kenyon Petition for Partial Reconsideration, it is necessary to deny the Motion for Leave to File Late-Filed Petition for Partial Reconsideration also filed by Kenyon on March 7, 1990. In its Motion, Kenyon refers to the fact that the *Notice* in this proceeding, released April 4, 1989, set forth two sets of coordinates for the proposed Channel 288C2 upgrade at Casa Grande. In its subsequent petition for rule making, filed November 22, 1989, Kenyon proposed a Channel 287C1 upgrade at Wickenburg, Arizona, which complied with the minimum spacing requirements with respect to both of the sites for the Casa Grande upgrade set forth in the *Notice*. However, the *Report and Order* in this proceeding, released January 11, 1990, upgraded the Casa Grande station at a site that was not proposed in the *Notice* or reflected in the Commission engineering data base. Thereafter, on February 2, 1990, the Kenyon petition for rule making for the Channel 287C1 upgrade at Wickenburg was returned due to a short-spacing to the Channel 288C2 allotment at Casa Grande. In view of the above, Kenyon argues that consideration of its Petition for Partial Reconsideration is warranted because it was not given timely notice of the alternate site for the Casa Grande upgrade and was thereby unable to "investigate thoroughly" and prepare a Petition for Partial Reconsideration within the prescribed 30-day period. In addition, Kenyon argues that consideration is warranted due to the public interest benefits of an upgraded allotment at Wickenburg and because its Petition for Partial Reconsideration requests that the reference site for the Casa Grande upgrade "be changed only slightly." Kenyon also contends that no party would be prejudiced in this matter because the licensee of Station KFAS has not begun construction of the upgraded facilities at Casa Grande.

7. We deny the Motion for Leave to File Late-Filed Petition for Partial Reconsideration. The 30-day period for the filing of a petition for reconsideration is mandated by Section 405 of the Communications Act and, as a consequence, we cannot consider an untimely petition for reconsideration in the absence of "extraordinary circumstances." *See Knoxville, Tennessee*, 47 RR 2d 1063, 1065 (1980); *Oildale, California*, 6 FCC Rcd 5858 (1991). There are no extraordinary circumstances in the present situation. At the outset, we first note that the synopsis of the *Report and Order* in this proceeding was duly published in the Federal Register on January 26, 1990, thereby affording Kenyon and any other interested party adequate legal notice of the action upgrading the Casa Grande allotment and the reference coordinates. *Cf. Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976).[8] In addition to the publication in the Federal Register, we also note that the conflicting alternate site was originally proposed in comments filed by Desert on May 26, 1989, and the *Report and Order* adopting this site was released on January 11, 1990. Both the Desert comments and the *Report and Order* were matters of public record, and, through diligence, Kenyon could have ascertained that an alternate site was under consideration and ultimately adopted. This would have afforded Kenyon additional time to prepare its Petition for Partial Reconsideration. It is also our view that in its Motion, Kenyon has not demonstrated that it could not have prepared its Petition for Partial Reconsideration during the 20 days between receipt of the staff letter returning its petition for rule making and the February 27, 1990, statutory deadline for the filing of a petition for reconsideration. In a separate vein, the fact that the coordinates of the alternate site were inadvertently not entered into the FM date base is not justification for considering an untimely petition for reconsideration. The FM data base is a secondary unofficial source. *See* Section 0.434(e) of the Rules. In fact, Section 0.434(e) specifically advises the public not to rely on the data bases, and that any proposal submitted to the Commission should be based on a primary source, such as a *Report and Order* published in the Federal Register. Finally, our action denying the Kenyon Motion does not preclude an upgrade in the facilities of Station KRDS-FM in Wickenburg. In a separate MM Docket No. 90-468, we upgraded the Wickenburg allotment to Channel 287C1.[9]

Phyllis Ehlinger Petition for Reconsideration

8. On April 23, 1990, Phyllis Ehlinger filed a letter requesting dismissal of her Petition for Reconsideration. Accordingly, this Petition for Reconsideration will be dismissed without further consideration.[10]

9. Accordingly, IT IS ORDERED, That the Motion for Leave to File Late-Filed Petition for Partial Reconsideration filed by Kenyon Communications IS DENIED.

10. IT IS FURTHER ORDERED, That the Petition for Partial Reconsideration filed by Kenyon Communications IS DISMISSED.

11. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Phyllis Ehlinger IS DISMISSED.

12. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[8] In *Gardner*, the Court of Appeals remanded an untimely petition for reconsideration to the Commission for consideration because the Commission had not afforded the petitioner adequate notice of its decision.

[9] *Wickenburg and Lake Havasu City, Arizona*, 6 FCC Rcd 5140 (1991). Interstate Broadcasting System of Arizona, Inc. has sought reconsideration of this upgrade requesting that it be able to implement its upgrade at the existing Station KRDS-FM transmitter site.

[10] Inasmuch as this request was filed prior to the October 4, 1990, effective date of the Commission action in *Amendment of Section 1.420 and Section 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911 (1990), it was not necessary for Phyllis Ehlinger to include an affidavit that she received no consideration for this dismissal.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ESATEL COMMUNICATIONS, INC. File No. I-T-C-92-127

Application for authority to acquire and operate facilities for INTELSAT Business Service (IBS) between Hawaii and Wake Island.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 11, 1992; Released: June 22, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed pursuant to Section 214 of the Communications Act of 1934, as amended; IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of private line service between Hickam Air Force Base (AFB), Hawaii and Wake Air Force Base, Wake Island to an agency of the U.S. Government by Esatel Communications, Inc. (Esatel).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-127 IS GRANTED, and Esatel is authorized to:

a. lease from Comsat and operate one full-duplex T-1 (1.544 mbps) satellite circuit between the 11-meter earth stations at Hickam and Wake Air Force Bases, via an appropriate INTELSAT satellite over the Pacific Ocean Region (POR), pursuant to a Comsat IBS tariff; and

b. use said facilities to provide private line service between Hickam AFB and Wake AFB to the Defense Communications Agency, an agency of the U.S. Government.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NARUC Petition for Rulemaking Regarding the Development of Relative Use Factors for Jurisdictional Separations — RM-7370

MEMORANDUM OPINION AND ORDER

Adopted: June 12, 1992; Released: June 22, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Under Part 36 of the Commission's rules,[1] local exchange carriers (LECs) are required to separate a number of facility costs between state and interstate operations by determining the relative state/interstate use of the respective facilities. Since 1986, the carriers have used the centralized system known as the Sampled Traffic Analysis and Reports System (STARS) to determine the relative-use separations factors applicable to investment in Interexchange Cable and Wire Facilities and related Circuit Equipment. At the February 1990 meetings of the National Association of Regulatory Utility Commissioners (NARUC), the Bell Operating Companies (BOCs) announced that at the end of 1990 they would terminate STARS and replace it with a number of decentralized systems being developed by individual LECs.

2. On April 3, 1990, NARUC filed the above-captioned petition to request that the Commission amend Part 36 of its rules to accomplish two things: (1) codify STARS as the only system to be used in developing these particular separations factors until such time as the CC Docket 80-286 Federal-State Joint Board (Joint Board) develops and recommends an acceptable replacement system and (2) specify a minimum frequency with which all relative-use separations factors must be updated.

3. On May 7, 1990, the Commission placed the petition on public notice; in response, thirteen parties filed comments, four parties filed reply comments and one party filed *ex parte* comments.[2] The petition is generally supported by all state commissions filing comments and by NTCA, a trade association representing 470 small LECs; it is opposed by all large LECs filing comments, and by the United States Telephone Association (USTA), an industry trade association representing approximately 1100 small and large LECs.

4. In this Order we consider the arguments raised in the petition and pleadings, and we review the proposed replacement systems. As explained below, we find that it would be inappropriate for STARS to become embedded in Part 36 of the Commission's rules. We also find that it would be inappropriate to amend these rules to specify a minimum frequency for the updating of relative-use separations factors. Accordingly, we find, pursuant to Section 1.401(e), 47 C.F.R. §1.401(e), that the NARUC petition does not warrant consideration by the Commission. We therefore deny the NARUC petition.

II. ISSUES

A. STARS Retention

5. **Background.** The purpose of STARS is to process a nationwide sample of traffic measurements from the public switched network to determine the jurisdictional split of traffic on a route-specific basis. Route-specific usage factors are the basis of jurisdictional separations for certain costs, including Interexchange Cable and Wire Facilities and related Circuit Equipment. STARS was initially developed because, although all LECs are able to determine the jurisdictional nature of all trunk traffic originating in their areas, most are able to make that determination for only a small portion of the trunk traffic that originates elsewhere and terminates in their areas. STARS therefore is useful to a LEC to the extent STARS is able to provide needed information about the terminating traffic. Unfortunately, STARS has been of limited use to independent LECs in recent years because it increasingly fails to measure this terminating traffic accurately. The BOCs have been able to use STARS because they installed technologically advanced switches that enable them to identify and record nearly all of the traffic terminating in their areas. Hence, all originating data and virtually all terminating data that are processed by STARS for an individual BOC are obtained from that carrier, not from the nationwide sample. The industry has been exploring alternative methods for replacing STARS because many independent LECs have been unable to validate STARS output data, and because STARS is not capable of capturing all types of traffic, particularly that which originates over special access facilities.[3]

6. To prevent STARS from being terminated before the matter could be studied, this Bureau issued a letter on August 17, 1990, directing all LECs to continue to provide

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[1] 47 C.F.R. Part 36 (1990).

[2] The following parties filed comments on June 7, 1990: Alabama Public Service Commission (Alabama); Michigan Public Service Commission Staff (Michigan); Florida Public Service Commission (Florida); Arkansas Public Service Commission, Kansas Corporation Commission, Missouri Public Service Commission and Oklahoma Corporation Commission (SW Regulatory Group); Public Utility Commission of Texas (Texas); BellSouth Corporation (BellSouth); Southern New England Telephone Company (SNET); Pacific Bell and Nevada Bell (PacTel); Southwestern Bell Telephone Company (SW Bell); Bell Atlantic Companies (Bell Atlantic); GTE Service Corporation (GTE); National Telephone Cooperative Association (NTCA); and United States Telephone Association (USTA). Reply comments were filed on June 22, 1990, by the Arkansas Public Service Commission and Missouri Public Service Commission (Arkansas and Missouri Commissions), NARUC, NYNEX, and PacTel. In addition, SW Bell filed *ex parte* comments on September 20, 1990.

[3] Megacom WATS traffic, for example, originates over special access facilities that connect customers directly to AT&T. Consequently, such traffic does not generate a message record in the area of origination. This situation compromises the accuracy of STARS because, absent a message record, STARS is unable to provide any useful information concerning this traffic to LECs that receive it in the terminating areas.

STARS with the updated traffic and routing data necessary for ensuring the system's accuracy for those LECs that rely on the traffic information it supplies.[4] We further directed the BOCs to support STARS financially and to continue their current use of STARS output data when developing their route-specific allocation factors. Such actions are necessary, we explained, to ensure that STARS is maintained until we determine that the proposed replacements are viable.

7. **Pleadings.** NARUC and all state commissions submitting comments believe the separations rules should be amended to require LECs to continue using STARS until such time as the Joint Board develops and recommends an acceptable replacement. They express concern that, absent such a rule change, LECs will implement a wide variety of replacement systems rather than developing a single new system that can be used uniformly throughout the industry. This proliferation of new systems would impede regulatory oversight, they believe, because it would compel regulators to become familiar with numerous methodologies in order to monitor the separations process. They also believe LECs should be required to show the impact that an alternative system would have on jurisdictional revenue requirements. The SW Regulatory Group further contends that, although STARS has some drawbacks, the need for a replacement is not urgent because the percent error generated by STARS is decreasing. They also claim that the abandonment of STARS, which is financed and administered by the BOCs, may place an unnecessary burden on small independent LECs.[5] Alabama further asserts that LECs use STARS output data not only for separations purposes but also for engineering studies, rate determination and intraLATA marketing.[6]

8. NTCA also favors the initiation of a rulemaking and Joint Board investigation to develop a new common nationwide system. NTCA expresses reservations, however, about the advisability of mandating the continued use of STARS. NTCA believes STARS is so deficient that it is no longer useful to small carriers, which are forced to rely on STARS output data from a prior period. NTCA states that, while the BOCs could likely improve STARS sufficiently to make it useful to small LECs, if the BOCs are not strongly committed to such an endeavor, small LECs will never find STARS useful even if it is codified in the rules.[7]

9. The BOCs, other large LECs and USTA contend that STARS is an old system that has outlived its usefulness. They claim that, due to the evolution of the network, originating bypass traffic, which STARS excludes, is increasingly significant, resulting in unreliable usage factors. GTE, for example, asserts that STARS fails to provide the end-to-end routing information that LECs need to derive accurate usage termination data because AT&T and the other IXCs do not provide routing information to STARS.[8]

10. The large LECs further oppose amending the rules to specify the STARS system, claiming that any mechanized system will be more efficient and accurate when not embedded in the rules. They believe carriers should be free to alter such systems to accommodate network changes or to replace them when other systems are available that better suit their particular circumstances and level of network complexity. Moreover, they state that the separations rules have never required the use of a specific system, such as STARS, for developing allocation factors. Such a requirement would be inappropriate, they argue, because it would force LECs to utilize an expensive and labor intensive computer system when less costly, more appropriate data sources are available.[9]

11. **Discussion.** In the *August 17 Letter,* we identified three concerns that the LEC industry must address before replacing STARS with decentralized systems. Our first concern was that federal and state regulators might be confronted with such a large number of different systems that regulatory oversight of them would be vastly more difficult. We therefore encouraged the industry to limit the number of methodologies it develops to cover the full range of network configurations. Our second concern was that the burden on small LECs be minimized. For this reason, we indicated that the industry should provide training programs for the methodologies appropriate to their networks. Our third concern was that the industry might adopt untested replacement methodologies that might later prove unreliable. Accordingly, we indicated that the industry must demonstrate the reliability of the proposed systems by properly testing the impact they would have on jurisdictional revenue requirements.

12. To address our first concern, the BOCs and large independent LECs developed three basic systems: the Network Model Method, the Matrix Usage Method and the End Office Method. The particular method a LEC chooses to use depends on its network configuration and the data recording capability of its switches. The Network Model Method is essentially a "mini-STARS" system for individual LECs. It uses a 5 percent traffic sample and a very detailed trunk-specific routing input that are similar to the data inputs employed in STARS. In contrast, the Matrix Usage Method produces a more accurate determination of the jurisdictional nature of the traffic, because it measures all of the trunk traffic instead of relying on a traffic sample. Yet, because the traffic is generally measured at tandem switches instead of local office switches, it generally is unable to capture as much routing detail as is available under the Network Model Method. Finally, the End Office Method is targeted to the needs of small LECs, because it relies primarily on existing traffic records of dial equipment minutes and thus generally does not require special traffic studies.

13. To address our second concern, the BOCs and several large independent LECs conducted a series of training sessions in eight different cities to familiarize other LECs

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[4] Letter of August 17, 1990, from the Chief of the Common Carrier Bureau to the Director of Regulatory Affairs at all LECs (*August 17 Letter).* In this letter, we inadvertently exempted average schedule companies from the requirement that all LECs provide traffic data to STARS. The Accounting and Audits Division corrected this error in a September 10, 1990, letter to David Cosson, Vice President of the National Telephone Cooperative Association. References to the *August 17 Letter* include this correction.

[5] SW Regulatory Group Comments at 4.

[6] Alabama Comments at 5-6.

[7] *Id.* at 3-5 and 8-10.

[8] GTE Comments at 4-5 and 8.

[9] *See, e.g.,* Bell Atlantic Comments at 2; USTA Comments at 3-4.

with the three alternative systems. These sessions were targeted to LECs performing their own separations studies and to consultants performing studies on behalf of LECs. Approximately 130 conferees, representing both LECs and consultants, attended the sessions. We therefore believe the industry has made a reasonable effort to provide LECs the training needed to implement the new systems.

14. Finally, to address our third concern, seventy-nine LECs submitted test results on July 19, 1991, demonstrating the effects that the proposed systems would have on jurisdictional revenue requirements. Further, in response to our July 8, 1991, letter requesting test results from the BOCs, all BOCs except US West, Inc. (US West) submitted a more complete set of test results on September 1, 1991.[10] Based on our analysis of these submitted results, we find that the three replacement systems have been shown to produce satisfactory usage reports which are at least as accurate as those obtained through STARS.

15. We have reviewed STARS and the three proposed replacement methods. We find that, compared to the centralized system used in STARS, the proposed decentralized systems generally employ more technologically advanced computer systems and are more likely to be compatible with the various network configurations exhibited by individual LECs. In addition, the use of decentralized systems will permit individual LECs to have easy and immediate access to systems under their control. This accessibility should permit LECs to update their route-specific separations factors more frequently, thereby addressing NARUC's concern that these factors be updated properly. Moreover, we find that these decentralized systems are at least as accurate and appropriate as STARS in fulfilling the requirements of the separations rules and that they should be able to do so in a more efficient and less costly way. For these reasons, we believe STARS should not become embedded in the rules.

16. We therefore conclude that all of the LECs that have submitted test results, a group that includes all large LECs except the US West operating companies, should implement one of the three replacement systems as soon as it is feasible to do so. In view of the complexity of the Network Model Method that US West is currently testing, we conclude that US West must continue using the most recent STARS output data available until it has submitted test results and we have determined that its alternative method is viable.[11] We recognize that, similar to US West, a number of small LECs also have not submitted test results. We nonetheless conclude that all small LECs should be encouraged to implement one of the three proposed systems as soon as possible. We note that these carriers have networks far less complex than that of US West and that they likely will be implementing a methodology far simpler than that which US West has proposed. Moreover, based on our analysis of the results submitted by small LECs participating in the test, we believe every small LEC will find one of the three proposed systems--the End Office Method especially--to be a viable alternative to STARS.

B. Factor Updating

17. **Background.** Section 36.2(a)(3) of the rules specifies that, in developing the separations factors based on measurements of relative use, carriers must determine the actual use of their facilities by measuring usage "during a representative period for all traffic."[12] This rule not only requires that the usage measurements be representative of all traffic but also requires that these measurements be properly updated when they no longer reflect actual use.

18. **Pleadings.** The state commissions and NARUC propose that this rule be amended to specify a minimum frequency with which separations factors must be updated. They believe such a change is necessary to ensure the reliability and timeliness of separations factors, particularly those based on direct measurements of federal/state relative usage. They claim such factors may generally underassign costs to interstate operations and, hence, may fail to reflect actual use as required by the rules. They further claim LECs are inconsistent as to the frequency with which they update their terminating/originating ratios, which are used in calculating some relative-use separations factors. They state that, whereas some LECs have updated the usage factors using recent STARS data, others have frozen the factors at 1986 levels or used mechanisms of their own invention to replace STARS.

19. In contrast, the large LECs and USTA submit that most LECs are properly updating their separations factors and that NARUC overstates the problem. GTE, for example, claims that NARUC is mistaken to infer from the historical increase in interstate calling that separations factors should necessarily produce a growing assignment of costs to interstate operations. This inference, GTE states, ignores the offsetting impact of other separations changes. GTE further states that the present rules provide a desirable degree of flexibility because each LEC is permitted to account for all the factors affecting usage and to employ its best judgement as to what is representative.[13] Bell Atlantic submits that, where problems exist, they can be resolved under the current rules.[14]

20. **Discussion.** Although NARUC concedes that Section 36.2(a)(3) requires LECs to use up-to-date information, it nonetheless claims this rule is of little use in enforcement proceedings because it lacks "teeth." It argues that the Commission should strengthen the rule by specifying a minimum frequency with which separations factors must be updated.[15] As to the claim that the rule does not facilitate enforcement, we observe that it already requires that relative-use separations factors reflect actual use and be based on measurements taken during periods representative of all traffic. The carriers therefore are accountable to the Commission for their decisions as to the frequency with which they update these factors.

21. As to the claim that a minimum frequency should be established for the updating of separations factors, we believe it is unclear whether such a change would improve the rule. Such factors are largely derived from basic stud-

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[10] These test results are available for inspection in the Accounting and Audits Division in File AAD 91-56. US West states that its testing program has encountered unexpected delays.

[11] US West shall submit its test results to the Chief, Accounting and Audits Division, who is hereby authorized to make a final determination on the acceptability of US West's method.

[12] 47 C.F.R. §36.2(a)(3) (1990).

[13] GTE Comments at 4 and 10.

[14] Bell Atlantic Comments at 3 and 5.

[15] NARUC Reply Comments at 6-7.

ies, and the need to update these studies varies greatly not only company to company but also, for any individual company, over time. Basic studies pertaining to the use of plant, for example, may not need annual updating because the change in relative use typically is so gradual that many studies may remain representative of current operations for two or three years. In contrast, basic studies pertaining to the use of certain expenses, especially those related to customer operations, need to be updated more frequently because this usage tends to be volatile. Basic studies also need to be updated more frequently when they pertain to operations in areas having high rates of economic or population growth.

22. The pleadings herein do not persuade us that a rule modification is needed at this time. Moreover, considering that such a change would have a widespread effect on the numerous separations procedures relying to some degree on basic studies, we believe this issue cannot be properly resolved on its own but, rather, needs to be addressed as part of a comprehensive review of the Part 36 rules. The Commission and the Joint Board are currently considering whether a full review of the separations rules is necessary. The issue of factor updating frequency is more appropriately assigned to that review.

III. ORDERING CLAUSE

23. IT IS ORDERED, pursuant to Sections 0.291 and 1.401(e) of the Commission's rules, 47 C.F.R. §§0.291, 1.401(e), that the petition for rulemaking filed by the National Association of Regulatory Utility Commissioners on April 3, 1990, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DIVERSIFIED TEL-COMM INC.,

Complainant,

v. File No. E-90-257

SOUTHERN BELL
TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: June 12, 1992; Released: June 22, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Diversified Tel-Comm, Inc.[1] ("BIZ-TEL) may be entitled to recover damages as a result of defendant's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that BIZ-TEL filed against the defendant local exchange carrier (LEC) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant case parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendant's liability for damages has been determined. We note that both complainant and defendant have argued the issue of liability extensively in their pleadings filed in the captioned case.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of this complaint proceeding will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. BIZ-TEL's damages claims rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendant's alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendant for interstate access services during the period January 1, 1987 through December 31, 1988,

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[1] The subject complaint was filed by Diversified Tel-Comm, Inc., d/b/a/ "BIZ-TEL". Complainant states that it purchased interstate access service from the defendant as "BIZ-TEL". The defendant does not dispute this assertion.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] The complainants relied, as does BIZ-TEL in the instant complaint, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992)

[6] Complainant and defendant, should they choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

and the amount it would have paid if the defendant's rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. The defendant raises a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. The defendant argues that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Defendant contends that the fact that its rates produced overearnings in one access service category is not sufficient to establish damage to the complainant.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which BIZ-TEL may have suffered actual damage as a consequence of defendant's alleged violations of the Commission's rate of return prescription. We tend to agree with BIZ-TEL in principle, that a possible measure of the damages stemming from defendant's alleged rate of return violations could be the difference between the rates it actually paid for defendant's interstate access services and the rates it would have paid if defendant's rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendant is found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendant may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of its access service offerings to establish or support its claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendant's excessive earning levels. Moreover, the defendant's factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendant that would tend to show that BIZ-TEL's share of the excessive earnings realized by defendant in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding BIZ-TEL's purchase of other interstate access services from defendant for the relevant monitoring period. We will also consider any other evidence submitted by the defendant that would refute BIZ-TEL's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendant's rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendant to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendant's access services during the relevant monitoring period and the amount complainant would have paid if the defendant's rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendant the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendant.[10]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendant written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendant may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendant may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

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[8] BIZ-TEL also seeks interest on this amount. We note that the defendant argues that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant proceeding will depend on the particular facts established by the parties.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

10. IT IS FURTHER ORDERED THAT complainant and defendant shall file their initial briefs no later than 20 days after the close of the thirty day discovery period and that complainant and defendant shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY, L.P.,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-270
NEW YORK TELEPHONE COMPANY,	File No. E-90-274
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-275
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-276
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-277
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-90-278
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-279
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-280
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-281
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-282
GTE NORTH INCORPORATED,	File No. E-90-284
and UNITED TELEPHONE COMPANY OF OHIO, INC.,	File No. E-90-286
Defendants.	

ORDER

Adopted: June 12, 1992; Released: June 22, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Charter Network Company, L.P.[1] (Charter) may be entitled to recover damages as a result of defendants'[2] alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that Charter presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[3] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[4] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[5] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[6]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the

[1] Charter filed the subject complaints on behalf of its operating companies through which it purchased interstate access service from the defendants.

[2] Northwestern Bell Telephone Company (NWB), Mountain States Telephone and Telegraph Company (MTN) and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. (U S West) is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaints, however, were filed prior to the consolidation. Accordingly, we shall refer to the carriers as they were named in the complaints.

[3] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[5] The complainants relied, as does Charter in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[6] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

captioned cases.[7] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[8]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Charter's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[9]

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[10] The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[11] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant.[12] Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. Some defendants contend that there is no significant difference between an award of damages based on the measure advocated by the complainant and the automatic refund rule found unlawful in *AT&T v. FCC*.[13]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Charter may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Charter in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that Charter's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Charter's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would

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[7] Complainant and defendants, should they choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[8] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[9] Charter also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant proceedings will depend on the particular facts established by the parties.

[10] The issues and arguments raised by defendants in response to Charter's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[11] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[12] Additionally, several defendants contend that the relevant overall interstate rate of return is that of the holding company in the aggregate, not each of the component operating companies. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See e.g.*, 5 FCC Rcd at 146 and 148 (1990). We find that the Commission's ruling is equally applicable to the defendants in this proceeding.

[13] *See, e.g.*, New York Telephone Company Motion to Dismiss at 4; New England Telephone and Telegraph Company Motion to Dismiss at 4.

refute Charter's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[14]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[14] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL TELEPHONE SERVICES, INC.,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-91-49
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-91-50
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-91-51
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-91-52
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-91-53
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-91-54
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-91-57
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-58
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-91-59
PACIFIC BELL TELEPHONE COMPANY,	File No. E-91-60
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, and	File No. E-91-61
NEW YORK TELEPHONE COMPANY,	File No. E-91-62

Defendants.

ORDER

Adopted: June 12, 1992; Released: June 22, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, National Telephone Services, Inc. (NTS) may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that NTS presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does NTS in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. NTS' damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant. Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. Some defendants contend that an award of damages based on the measure advocated by the complainant would result in the same consequences as the automatic refund rule found unlawful in *AT&T v. FCC*.[10]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which NTS may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return, prescription. We tend to agree with NTS in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainants suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that NTS' share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding NTS' purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute NTS' claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid

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[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] NTS also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to NTS' claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] *See, e.g.*, New England Telephone and Telegraph Company Motion to Dismiss at 4; New York Telephone Company Motion to Dismiss at 4.

for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[11]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[11] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Haddonfield Wireless Company — File No. 5313-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on E-group channels at Phoenix, Arizona

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1992; Released: June 22, 1992

By the Chief, Domestic Facilities Division:

1. The above-referenced application of Haddonfield Wireless Company (Haddonfield) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Phoenix, Arizona area was selected for qualification review as the result of a Commission lottery. United Cable Television of Scottsdale, Ltd. (Cable) filed a post-lottery Petition to Deny arguing that Haddonfield's application violates 47 C.F.R. Sec. 21.17 because it fails to demonstrate Haddonfield's financial qualifications. Haddonfield filed an opposition.

2. We note that since Cable's pleading was filed, the Commission revised Section 21.17. "We conclude... that an attestation of the applicant's financial fitness is the most effective way of deterring speculative applicants without burdening the applicants and the Commission staff with additional detailed information." *Part 21 Revision Order*, 2 FCC Rcd 5713, 5719 (1987). Haddonfield's application is subject to this policy. *See id.* at n.57. Consequently, Haddonfield will be required to file a financial certification.

3. Accordingly, IT IS ORDERED that the Petition to Deny filed by United Cable Television of Scottsdale, Ltd. of Haddonfield Wireless Company's Phoenix, Arizona MMDS application IS HEREBY DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec. 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 23, 1992

GASTON MEMORIAL HOSPITAL FILES PETITION FOR WAIVER OF ACCESS CODE UNBLOCKING REQUIREMENT FOR PAY TELEPHONES

Comment Date: July 24, 1992
Reply Comments Due: August 7, 1992

Gaston Memorial Hospital has filed a petition for waiver of Section 64.704(c) of the Commission's rules requiring call aggregators to unblock equal access ("10XXX") codes.

Gaston Memorial Hospital maintains that its customer-owned coin-operated telephones ("COCOT") are technically incapable of providing 10XXX unblocking, that the manufacturer of its COCOTs is no longer in business, and that the expense of modifying its COCOTs would be significant. Gaston Memorial Hospital proposes an alternative to unblocking which it claims permits customers to use the operator services providers of their choice.

Parties wishing to comment on this matter may do so not later than July 24, 1992. Reply comments may be filed not later than August 7, 1992. All filings concerning this matter should refer to ENF-92-07. A copy of the petition for waiver and any subsequently filed documents in this matter may be obtained from the Downtown Copy Center, 1142-21st Street, N.W., Washington, D.C. 20036, (202) 452-1422, and in Room 246 at 1919 M Street, N.W., Washington, D.C. 20554. The petition and documents are also available for inspection and copying in the Public Reference Room, Plaza Level, 1250-23rd Street, N.W., Washington, D.C. 20554.

For further information, contact Kurt Schroeder at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 23, 1992

CUSTOMER-OWNED COIN-OPERATED TELEPHONE PROVIDERS FILE PETITIONS FOR WAIVER OF ACCESS CODE UNBLOCKING REQUIREMENT

Comment Date: July 24, 1992
Reply Comments Due: August 7, 1992

Fifteen private payphone providers have filed petitions requesting waiver of Section 64.704(c) of the Commission's rules requiring call aggregators to unblock equal access ("10XXX") codes. The petitioners are identified in Appendix A.

In support of their waiver requests petitioners state that compliance with the unblocking requirements would impose excessive financial burden and increase the vulnerability of payphone providers to fraudulent calling.

Parties wishing to comment on this matter may do so not later than July 24, 1992. Reply comments may be filed not later than August 7, 1992. All filings concerning this matter should refer to File No. ENF-92-06. A copy of the petitions for waiver and any subsequently filed documents in this matter may be obtained from the Downtown Copy Center, 1142-21st Street, N.W., Washington, D.C. 20036, (202) 452-1422, and in Room 246 at 1919 M Street, N.W., Washington, D.C. 20554. The petitions and documents are also available for inspection and copying in the Public Reference Room, Plaza Level, 1250-23rd Street, N.W., Washington, D.C. 20554.

For further information, contact Kurt Schroeder at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

APPENDIX A

The following petitioners have requested waiver of Section 64.704 of the Commission's rules concerning the requirement to unblock equal access codes:

4M Communications Inc.,
American Paytel,
Coin Op Phone Service of New Jersey,
Coincall Plus, Inc.,
Dennison Group Ltd.,
Easy Living Telecommunications Inc.,
IMR Capital Corporation,
Lincoln Telephone and Telegraph Company,
M&M Telecommunications, Inc.,
National Telecoin Corporation,
Pay Tel Communications, Inc.,
Pennsylvania Pay Telephone,
Pier 7 Restaurant,
Telaleasing Enterprise, Inc.,
and Tri-County, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Lynn Twedt	File No. 765001
George Kern	File No. 765019
John Dudeck	File No. 768462
Ivan Nachman	File No. 768467
Blake Twedt	File No. 768469

For Licenses in the Private Operational- Fixed Microwave Service

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1992; Released: June 23, 1992

By the Commission:

1. The Commission has before it for consideration Applications for Review filed by Multi-Micro, Inc. and Tri-County Communications, Inc. (petitioners).[1] Petitioners seek reversal of Private Radio Bureau (Bureau) decisions that held that applicants in the private radio services are not required to provide reasonable assurance of the availability of the antenna site specified in their applications. For the reasons set forth below, the Applications for Review will be denied.

2. The above-captioned applicants filed for licenses in the Private Operational-Fixed Microwave Service in the Lynchburg, Virginia area. Application Form 402, Item 11, requires applicants for such facilities to designate the location of their proposed antenna structure. All of the above-captioned applicants designated sites for their proposed antenna structures. Petitioners objected to grant of these applications, however, on the basis that none of the applicants had reasonable assurance that these sites were, in fact, available. Petitioners contend that the Bureau overruled their objections on the grounds that applicants in the Private Operational-Fixed Microwave Service are not required to provide reasonable site assurance. Petitioners maintain that the Bureau's disposition of these cases on this basis is incorrect and contrary to case precedent and Commission policy.

3. Petitioners argue that any applicant for a new radio facility must have reasonable assurance of the availability of the antenna site it specifies in its application. Citing, by way of example, *Cuban-American, Ltd.*, 2 FCC Rcd 3264 (Rev. Bd. 1987), petitioners submit that the touchstone for reasonable assurance of site availability is express approval from the site owner or the site owner's authorized agent, or at the very least some basic negotiations between the parties from which reasonable assurance can be inferred. Petitioners submit that the above-captioned applicants did not have reasonable assurance that their transmitter sites were available to them and, thus, that their applications should have been dismissed or denied. The Bureau, however, disagreed, taking the position that private radio applicants are not required to determine the availability of their transmitter sites at the time they file their applications.[2] Rather, the Bureau noted that in the private radio services applicants are required to construct within strict timeframes. If they fail to construct, the Bureau noted, the license for the facility cancels.

4. We hold that precedent applying the reasonable assurance doctrine to antenna site availability in the mass media and common carrier services is inapposite to the private radio services. There are no rules in the private radio services nor is there any case law that applies to the private radio services requiring us to impose the doctrine of reasonable assurance to antenna site availability in those services. The need to establish a *particular* antenna site or sites is critical to various aspects of Commission regulation of the mass media and common carrier services, and in many ways defines the parameters of the associated authorization for a mass media or common carrier station. Specification of a particular antenna site for a private radio station does not involve the same regulatory concerns.

5. The service contours (the Grade "A" and "B" contours) that define a mass media station's service area, for instance, are based upon engineering projections ("radials") emanating from that particular antenna or antenna array which, in turn, are based upon height, power and configuration. The service contours form a large basis for regulation of the mass media station, which focuses on service to the public. For instance, they determine whether an FM station may be located in or serve a particular community, or where a mass media station may place its studio. Absent reasonable assurance that the antenna or antenna array can be located at a specified site, the Commission's regulatory presumptions underpinning grant of a construction permit to a mass media station are rendered largely invalid.

6. Common carrier stations, unlike private radio stations, have an obligation to provide service to the public. Whether a common carrier mobile services or cellular applicant, for example, is even minimally qualified hinges in large part on whether it serves the market for which it applies and does not intrude on other public offerings of

[1] Tri-County Communications, Inc. petitioned to deny the applications of Lynn Twedt and George Kern for new H-channel station authorizations in the Private Operational-Fixed Microwave Service (OFS) (Compliance Case #91187). Tri-County's petition was denied by letter of the Chief, Microwave Branch, Licensing Division, dated March 27, 1991. Multi-Micro, Inc., petitioned to deny the applications of John Dudeck, Ivan Nachman and Blake Twedt (Compliance Case #91193). Multi-Micro's petition was denied by letters of the Chief, Microwave Branch, Licensing Division, dated February 11, 1991.

[2] The representations made in any application must be "true and complete." The specification of a site in a private radio license application, however, is not construed as a representation that a site has been secured or that negotiations to acquire a site are likely to succeed but instead is construed as representation of an expectation of site location for technical purposes (to determine interference potential, etc.). *See* paragraph 8 and note 4, *infra*.

communication services in other markets. This regulatory concern, as well as many others, once again assumes particular antenna locations at particular sites. Absent reasonable assurance that the antenna(s) can be located at the specified site(s), the Commission's engineering analyses upon which it bases grant of an authorization would be presumptively flawed.

7. Unlike mass media stations, inherently regulated by their service contours, and unlike common carrier stations, regulated as providers of communications services to the public, there are no regulatory concerns that give rise to a need for reasonable site assurance prior to grant. Our primary regulatory concern in the approval of private radio licenses is that they do not cause and are not subject to harmful interference, rather than ensuring service to the public or a particular community.

8. The construction requirements that we do impose in the private services are stringent, and exist to assure spectrum utilization and spectrum efficiency. Most stations in the private services, including those in the private operational-fixed microwave services, must be constructed within a specified period of the date of initial grant of a license or that license cancels automatically.[3] We are satisfied with regard to our regulatory concerns of spectrum utilization and spectrum efficiency if that private radio station is indeed constructed within that period. We do not have a particular regulatory concern about whether a private radio station is actually constructed at the site initially specified, so long as an alternative site has been approved, thus verifying that interference criteria have been met and that there are no other technical concerns.[4] A private radio licensee may file an application to amend a license to reflect a different base or mobile relay station site before initial construction. So long as such a modification application is timely filed and the new location satisfies all interference criteria, the modification is typically granted. Unless a request for an extension of time to construct the station is filed and fully supported, the new site must be completed within the original timeframe.

9. Petitioners argue that the public interest in deterring speculative applications requires that we apply the doctrine of reasonable assurance to specified antenna sites for applications in the private services. We disagree. The rules themselves require prompt construction following authorization. This alone serves as some deterrent to speculative applications, particularly since failure to construct on time results in the automatic cancellation of licenses. Even if these requirements do not deter all speculative applications, it is a fact that the Commission has not to this date imposed the reasonable assurance doctrine upon private radio applicants that specify particular antenna sites, and we do not believe it would serve the public interest to do so now. Accordingly, private radio applicants, including applicants for stations in the private operational-fixed microwave service, need not undertake a site availability search prior to filing their applications.

10. For all the reasons stated above, we conclude that petitioners' Applications for Review are without merit. Accordingly, we affirm the Bureau's denial of the Petitions for Reconsideration and we affirm grant of the above-captioned applications. Therefore, IT IS ORDERED that the Applications for Review filed by Tri-County Communications, Inc. and MultiMicro, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[3] Stations in the private operational-fixed microwave services must be constructed within twelve months of the date of initial license grant.

[4] Of course, any antenna site must be scrutinized to determine whether it is in the vicinity of certain receiving locations, whether it may have a significant environmental effect (*see* 47 C.F.R. §§ 1.1307, 1.1308, 1.1311 and 1.1312), whether it requires notification to the Federal Aviation Administration (*see* 47 C.F.R. §§ 17.7 through 17.17), and whether it requires prior coordination because of its proximity to United States borders (generally, this includes facilities to be constructed north of Line A or east of Line C).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN SHARECOM, INC.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY,	File No. E-91-131
PACIFIC BELL TELEPHONE COMPANY,	File No. E-91-132
GTE NORTHWEST INCORPORATED, and	File No. E-91-133
WISCONSIN BELL TELEPHONE COMPANY,	File No. E-91-134

Defendants.

ORDER

Adopted: June 16, 1992; Released: June 23, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, American Sharecom, Inc. (American Sharecom), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that American Sharecom presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record, on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. American Sharecom's damages claims rest primarily on the contention that the proper measure of the damages it has suffered as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access

[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order), recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order), appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does American Sharecom in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order)* and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982, (Com.Car.Bur. 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. Defendants raise a number of challenges to complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] Defendants argue in unison that any damages award based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. The two defendant Ameritech companies contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainant when their and their parent holding company's overall interstate rates of return were below the authorized level.[10] GTE Northwest contends that an award of damages based on the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.[11]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which American Sharecom may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with American Sharecom, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violation could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainant in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that American Sharecom's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding American Sharecom's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute American Sharecom's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainant information necessary to compute the difference between the amount complainant actually paid for defendants' access services during the relevant monitoring period and the amount complainant would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[12]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to complainant within the thirty-day period.

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[7] American Sharecom also seeks interest on this amount. We note that Pacific Bell argues that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by the defendants in response to American Sharecom's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they were part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,034 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] Answers of Michigan Bell and Wisconsin Bell at 2.

[11] Answer of GTE Northwest at 2.

[12] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainant and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainant and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Mountain Signals, Inc.

Licensee of Radio Station
WETB(AM), Johnson City, TN

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 1992; Released: June 23, 1992

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $10,000 Notice of Apparent Liability (NAL) issued May 14, 1991, to Mountain Signals, Inc. ("Mountain Signals"), licensee of Station WETB(AM), Johnson City, Tennessee; and (2) Mountain Signals' response to the NAL dated June 18, 1991.

2. The NAL was issued for an apparent unauthorized transfer of control of the station, in violation of Section 73.3540(a) of the Commission's Rules[1] and Section 310(d) of the Communications Act of 1934, as amended.[2] On July 24, 1989, an application for an assignment of license for Station WETB(AM) (File No. BAL-890724EE) from Alpha-Omega Broadcasting, Inc. ("Alpha") to Mountain Signals was filed with the Commission. As a result of questions raised by the filing, the Audio Services Division asked for a clarification of the agreement between the parties to the assignment. On October 11, 1989, William J. Cockett, counsel for Mountain Signals, sent the Commission a memorandum describing those circumstances.

3. The NAL was based on the facts presented in the October 11, 1989, narrative. Based on those facts, which are presented more fully in the NAL, the Mass Media Bureau found that Mountain Signals took over operation of WETB(AM) on May 5, 1989. Although assignment and renewal applications were granted on December 5, 1990, both of these grants were expressly made without prejudice to any sanctions that might be deemed appropriate. The subsequent $10,000 NAL found that an apparent willful and continuing violation of Section 73.3540(a) of the Commission's Rules and Section 310(d) of the Communications Act of 1934, as amended, occurred from May 5, 1989, until December 5, 1990.

4. Mountain Signals' response to the NAL offers little pertinent information to supplement its earlier submission. Although Mountain Signals' response does not directly assert that Alpha remained in control until the assignment application was granted, it does state that there were no changes made in the policy, personnel, or operations during that period. The response also states that Alpha was in full agreement that Mountain Signals would manage the station commencing on May 5, 1989.

5. The implication that a premature transfer of control did not take place is unwarranted. To the contrary, Mountain Signals' own previous submissions demonstrate its control over the station and, indeed, Alpha's abandonment of the station to Mountain Signals. The Memorandum submitted by Mountain Signals on October 11, 1989, states, "This agreement (with Alpha) was reached on May 5, 1989, at which time Mountain Signals, Inc. was forced to take over the operation of the radio station." The response to the NAL states that at all times material to the forfeiture Mountain Signals provided the funds to keep WETB(AM) on the air. Finally, a June 19, 1989, letter accompanying the FCC Form 314 assignment application (which was returned because it did not include a $500 filing fee) notes that Mountain Signals was not able to locate Trevor F. Swoyer, president of Alpha, to obtain his signature.

6. In addition to its response, Mountain Signals submits financial information to demonstrate an inability to pay the forfeiture. This information includes copies of federal income tax returns for Mountain Signals for 1989 and 1990, and a "balance sheet" for January 1, 1991, through May 31, 1991. However, income tax returns are not sufficient evidence of inablity to pay, and the "balance sheet" does not meet the requirements stated in the attachment to the NAL in that it does not conform to generally accepted accounting principles. The financial showing does not, therefore, warrant a reduction in the forfeiture.

7. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED that Mountain Signals, Inc., licensee of Radio Station WETB(AM), Johnson City, Tennessee, FORFEIT to the United States of America the sum of Ten Thousand Dollars ($10,000) for the willful and continuing violation of Section 310(d) of the Communications Act of 1934, as amended, and 47 C.F.R. Section 73.3540(a), which occurred from May 5, 1989, until December 5, 1990. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum Opinion and Order, a check or similar instrument payable to the Federal Communications Commission. In regard to the forfeiture proceeding, the licensee may take any of the actions set forth in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart,
Chief, Mass Media Bureau:

FOOTNOTES

[1] Section 73.3540(a) of the Commission's Rules states that:

> Prior consent of the FCC must be obtained for a voluntary assignment or transfer of control.

[2] Section 310(d) of the Communications Act of 1934, as amended, states, in pertinent part:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest convenience and necessity will be served thereby.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 11, 1992

Released: June 23, 1992

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Morton L. Berfield, Esq.
Cohen and Berfield
Attorneys
Board of Trade Building
1129 20th Street, N.W.
Washington, D.C. 20036

Re: Notice of Forfeiture issued to Crista Ministries Inc. on November 29, 1991. 3153501-92001

Dear Mr. Berfield:

This is in response to your letter to the Federal Communications Commission's (FCC) Seattle, Washington Office dated December 16, 1991. Your letter requested that a $7,500 monetary forfeiture penalty assessed by the FCC's Seattle Office against Crista Ministries Inc. (Crista), Seattle, Washington "be referred to the appropriate Commission office in Washington, D.C. . . . for resolution."

We are treating your request as a Petition for Reconsideration under Section 1.106 of the FCC's rules. 47 C.F.R. Section 1.106. As explained below, the monetary forfeiture penalty is reduced to $6,000, and this penalty is affirmed.

Our records show that on September 19, 1991, the FCC's Seattle Office received a complaint from a private citizen that on that date at 11:45 a.m., he visited co-located broadcast stations KCIS(AM) and KCMS(FM) (licensed to Crista), Edmonds, Washington, and requested to view the stations' public inspection file. The complaint states that the stations' operations manager denied the request because the stations were too busy and that if a person wished to see the file, he should telephone to make an appointment.

On September 23, 1991, at approximately 3:05 p.m., an FCC inspector visited the stations and asked a receptionist if he could view the public inspection file. The receptionist said no because the station manager was at a convention that week and, therefore, the request would have to be submitted at another time. The FCC inspector then requested the file from the stations' business manager, and she denied the request because the file was locked in the station managers office and she did not believe it would be proper to allow a stranger in the office.

The business manager then asked the FCC inspector what he wanted to see in the file, who he was, where he lived, what his phone number was, and whether he had previously visited the station? The business manager also declined a second time to allow the public inspection file to be viewed, and suggested that the inspector phone on September 26 to make an appointment to see the file. As the inspector was leaving the station, the business manager offered to telephone the inspector, but did not state when.

The FCC's Seattle Office issued Crista a Notice of Apparent Liability on October 3, 1991, for willfully violating Section 73.3526(d) of the FCC's rules. 47 C.F.R. Section 73.3526(d). Section 73.3526(d) requires broadcast stations to have their public inspection files "available for public inspection at any time during regular business hours." Crista replied to the Notice of Apparent Liability in an undated letter. Attached to the letter was a statement from Anthony K. Bollen, general manager of stations KCIS(AM) and KCMS(FM), dated October 30, 1991; and a memorandum from the law offices of Cohen and Berfield. On November 29, 1991, the FCC's Seattle Office issued Crista a Notice of Forfeiture for a $7,500 monetary forfeiture penalty. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934. 47 U.S.C. Section 503(b).

Crista acknowledges that it denied requests to view its public inspection file on September 19 and 23, 1991, but it states several reasons why the monetary forfeiture penalty should not be imposed. Crista explains that on September 19, it "may have misunderstood whether the visitor was interested in the files or in talking with someone knowledgeable as to the coverage area of the stations. . . ." Nevertheless, based on the information in the complaint and Crista's statements, Crista denied access to its public inspection file on September 19, and requested the visitor to make an appointment to view the file. The FCC's public inspection file rule provides that this file must be available for inspection during a station's normal business hours. This rule has been interpreted to mean that the public inspection file should "be available for immediate inspection by members of the public." *Thomas P. Brunnock*, 50 RR2d 1313, 1314a (1982). The Commission, moreover, has stated that "Members of the public cannot be required to inspect that file only through prior appointments or at times most convenient to the licensee. . . ." *License Renewal Applications of Certain Commercial Televisions Stations Serving Philadelphia*, 67 RR2d 1567, 1573 (1990).

Concerning the FCC inspector's request to view the public inspection file on September 23, Crista states "Ms. Neely had a key to the office [where the file was located] but was uncomfortable letting a stranger in the Operations Manager's Office without [his] permission." It would appear that the file could have been removed by Ms. Neely from this office to obviate this concern. Crista further states that "Ms. Neely explained . . . that the only manager available was on the air." If Crista believes that it was necessary for a manager to make the decision to allow its public inspection file to be viewed, it would appear that Ms. Neely could have done this since Ms. Neely had identified herself to the FCC inspector as the business manager. Crista also states that "Ms. Neely offered to call" the FCC inspector "by the end of the day or the next morning." The FCC inspector agrees that Ms. Neely offered to phone him, but she did not indicate when she would call. Regardless of the exact details of the above, the FCC inspector's request to view the public inspection file was denied and there was no attempt to make it immediately available to him.

Crista explains that the monetary forfeiture penalty should not be imposed since it took prompt remedial action to correct the violation. Remedial action to correct a violation, although commendable, does not nullify a

forfeiture penalty. *E.g., Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

It is also argued that Crista should not be subject to a penalty since it is a non-profit organization. The FCC does not distinguish between non-profit and for-profit organizations in imposing monetary forfeiture penalties.

Crista objects to the statement in the FCC's Notice of Apparent Liability that the violation was "willful" since "There was no intent to withhold access to the Public Files, and in both instances CRISTA employees attempted to be helpful. . . ." Section 312(f)(1) of the Communications Act of 1934 defines willful as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule . . . of the Commission." 47 U.S.C. Section 312(f)(1).

Willfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question. Furthermore, to establish a willful violation, it is not necessary to show that a person knew he was acting wrongfully. In addition, one of the main policy factors guiding the FCC in imposing forfeitures has been whether a willful act demonstrated a lack of concern, indifference or laxity regarding compliance with the FCC's rules. *Midwest Radio - Television, Inc.*, 45 FCC 1137, 1141-42 (1963). In Crista's situation, there was a willful violation since Crista consciously and voluntarily denied access to its public inspection file, and it is not relevant whether Crista realized that its denial violated an FCC rule.

Crista explains that in other FCC cases, the FCC has not imposed monetary forfeiture penalties "where the file were not readily available but station employees made attempts to make the files available at a subsequent time." There are FCC decisions where the FCC declined to impose a forfeiture, but in these cases, it appears that there were extenuating circumstances not present in Crista's situation such as very short delays in providing public inspection files or a station moving to a new location.

Crista cited *Thomas P. Brunnock*, 50 RR2d 1313 (1982), in support of its position. In this case there was a two hour delay in making a file available in response to a single request, and the FCC did not impose a penalty. In Crista's situation, there were two requests and denials four days apart. Furthermore, there was no clear indication that the file would be promptly provided in response to these requests. Since access to the file was denied four days after the first request, this reflects that the file was not promptly being made available to the public. As previously explained, the FCC's rule was interpreted by the *Thomas P. Brunnock* decision to require that the file be provided immediately. If the station had a public inspection file, it appears that its employees believed that they were too busy in their normal activities to attempt to provide it. This is exactly the type of situation where a penalty is warranted.

Also cited by Crista is the *Jose Pedro Bio* decision. 50 RR2d 1413 (1982). Crista states that in this case there was more than a four month delay in making a file available, and no sanction was imposed. The *Jose Pedro Bio* case was decided by the Complaints and Compliance Division of the Mass Media Bureau rather than the Commission, and, therefore, has limited precedential value. The Division declined to impose a penalty based on the stated rationale that the file was eventually provided and the delay was based on a good faith misunderstanding of the FCC's rules. However, numerous Commission decisions have held that a misunderstanding of the FCC's rules does not excuse a violation. *See, e.g., Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1242 (1984).

Regarding a third case cited by Crista, *License Renewal Applications of Certain Commercial Television Stations Serving Philadelphia*, 67 RR2d 1567 (1990), Crista states "There a licensee had a policy of suggesting appointments for persons wishing to inspect the public files. The Commission ruled that while the public can not be required to make prior appointments, the station's policy did not warrant the imposition of any sanction." This is not exactly what the Commission stated in this case. The Commission explained that although the licensee had a policy of requesting a prior appointment, which was improper, a penalty would not be imposed because it appeared that the licensee did not refuse inspection if a person lacked an appointment and there was no evidence that anyone had been denied access. 66 RR2d at 1573. This decision, therefore, does not support Crista's position.

Finally, Crista claims that a monetary forfeiture penalty should be considerably reduced or eliminated by applying the downward adjustment criteria contained in the FCC's *Policy Statement, Standards for Assessing Forfeitures*, 69 RR2d 823 (1991), *modified in part on recon.*, FCC 92-212, adopted May 14, 1992. The *Policy Statement* provides for a monetary forfeiture penalty of $7,500 when there is a violation of the FCC's public file rule, and we believe that this penalty as a base amount for Crista's violation based on guidance in the Policy Statement is appropriate.

Crista argues that the penalty should be reduced because there was only a minor violation. The seriousness of this type of violation was taken into consideration when the Commission established a "base" forfeiture of $7,500 for this type of violation. 69 RR2d at 824. Regarding whether this was a minor violation relative to other possible violations of the same rule, it is not a minor violation when two violations occur during a period of several days. This is a repeated or continuing violation for which the FCC would be justified in imposing a $7,500 forfeiture for each violation. The *Policy Statement* made clear that the $7,500 forfeiture for Crista's violation was "for a single violation or single day of a continuing violation." 69 RR2d at 825 n.1. The *Policy Statement* also authorizes an upward adjustment of the base amount of monetary forfeiture penalties for "repeated or continuous violations." 69 RR2d at 827.

However, taking into account, in general, the downward adjustment criteria in the *Policy Statement*, especially lack of evidence regarding past noncompliance with the FCC's rules, the penalty is reduced from $7,500 to $6,000.

Please request Crista to submit the $6,000 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. The number 3153501-92001 should be placed on the check and it should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days may be recovered by the U.S. Attorney in a civil suit. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

cc: Crista Ministries Inc.
Licensee of KCIS and KCMS
19303 Fremont Avenue N
Seattle, Washington 98133

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 7, 1992

Released: June 23, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Radio Moultrie, Inc. 8210-BH
Licensee, Station WMGA C11-830
P.O. Box 1380
Moultrie, GA 31776

Dear Sir or Madam:

This letter constitutes a Notice of Apparent Liability for a forfeiture in the amount of ten thousand dollars ($10,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the provisions of Section 310(d) of the Communications Act of 1934, as amended, and 47 C.F.R. Section 73.3540(a) which require prior Commission consent to transfers of control; and for violation of the requirement to file an annual ownership report, 47 C.F.R. Section 73.3615(a). This action is being taken by the Chief of the Mass Media Bureau pursuant to the delegation of authority in Section 0.283 of the Commission's Rules.

BACKGROUND

On April 3, 1991, you filed an application for an assignment of the license for Station WMGA (File No. BTC-910403EB) from James D. Hardy and Douglas M. Sutton to Dr. James Charles Elder, Sr., G. Christopher Elder and Douglas M. Sutton. Information you provided in this application demonstrated that your application, in fact, sought approval of prior transactions that involved transfers of control of Radio Moultrie undertaken without prior Commission consent. These transactions commenced in February 1990 and were concluded in July 1990.

Prior to the first of these transactions James D. Hardy and Douglas M. Sutton each owned 50% of the voting stock in the licensee Radio Moultrie. In February 1990, Mr. Hardy sold his 50% interest to Dr. Elder. Subsequently, in July 1990, Dr. Elder gave a gift of a third of his shares (16.66%) to G. Christopher Elder and Mr. Sutton sold a third of his shares (16.66%) to G. Christopher Elder.

No transfer of control applications were filed prior to either of these transactions as required by Section 310(d) of the Communications Act and Section 73.3540(a) of the Commission's Rules. Nor was an ownership report for 1990 filed. On April 3, 1991, however, the above-referenced assignment application was filed. It was granted by the Commission on September 6, 1991. This grant was expressly without prejudice to any further action that the Commission might deem appropriate in this matter.

DISCUSSION

Under Section 310(d) of the Communications Act of 1934, as amended, no station license or the rights thereunder may be transferred, assigned or disposed of in any manner except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served thereby. Section 73.3540(a) of the Commission's Rules contains a similar provision. Section 73.3540(d) requires a "long form" assignment application (FCC Form 315) to be filed when 50% or more of the voting stock of a licensee is being transferred. Section 73.3540(f)(4) requires a "short form" assignment application (FCC Form 316) to be used in the case of the transfer of lesser amounts such as were involved in the July 1990 transactions. Section 73.3615(a) of our Rules requires each licensee to file an Ownership Report on FCC Form 323 once a year, on the anniversary of the date that its renewal application is required to be filed.

Mr. Hardy's sale of 50% of the voting stock of Radio Moultrie, Inc. to Dr. Elder in February 1990 was done without the filing of a Form 315 application and prior Commission approval. Thus, it resulted in an unauthorized transfer of control, in violation of Section 310(d) of the Communications Act and Section 73.3540(a) of the Commission's Rules. The July 1990 transactions -- the gift of one third of Dr. Elder's shares to G. Christopher Elder and the sale of one third of Mr. Sutton's shares to G. Christopher Elder -- were accomplished without the filing of Form 316 applications and Commission approval. Thus, these transactions, too, violated Section 310(d) of the Communications Act and Section 73.3540(a) of the Commission's Rules. Additionally, Radio Moultrie, Inc. failed to file an ownership report for 1990, in violation of Section 73.3615(a).

CONCLUSION

This Notice of Apparent Liability for a Monetary Forfeiture of Ten Thousand Dollars ($10,000.00) is issued for willful and continuing violation of Section 310(d) of the Communications Act of 1934, as amended, 47 C.F.R. Section 73.3540(a), and 47 C.F.R. Section 73.3615(a). You were in continuing and repeated violation of the statute and Section 73.3540(a) from February 1990, until September 6, 1991, the day your assignment application was granted. You have been in continuing violation of Section 73.3615(a) since December 1, 1989. The amount of the proposed forfeiture is based on the factors discussed in Section 503(b)(2) of the Communications Act of 1934, as amended and the guidelines described in our recently adopted *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*.

The attachment summarizes the actions you may take in response to this Notice, as provided in 47 C.F.R. Section 1.80. If you wish to make a claim of financial inability to pay this Notice of Apparent Liability, Section I(B) of that attachment is informative on how to make such a showing. Additionally, with regard to your violation of Section 73.3615(a), you are HEREBY ORDERED to file an ownership report for 1990 for Station WMGA within fifteen days of the date of this Notice.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart,
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY L.P.,
Complainant,

v.

NEW YORK TELEPHONE COMPANY,	File No. E-90-122
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, and	File No. E-90-123
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-125

Defendants.

ORDER

Adopted: June 16, 1992; Released: June 24, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, US Sprint Communications Company L.P. (US Sprint), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that US Sprint presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. US Sprint's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31,

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does US Sprint in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be

1988, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rates of return were below the authorized level. Defendants maintain that, under *AT&T v. FCC*, they must be, allowed to offset overearnings in individual access categories against underearnings in access categories. Defendants contend that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which US Sprint may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with US Sprint, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that US Sprint's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding US Sprint's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute US Sprint's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[10]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of

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viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] US Sprint also seeks interest on this amount. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to US Sprint's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ONE CALL COMMUNICATIONS, INC.,
Complainant,

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-193
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-194
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-195
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-197
PACIFIC BELL TELEPHONE COMPANY, and	File No. E-90-198
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-199

Defendants.

ORDER

Adopted: June 16, 1992; **Released: June 24, 1992**

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, One Call Communications, Inc. (One Call), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that One Call presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. One Call's damages

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does One Call in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*,[9] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rates of return were below the authorized level. Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. Defendants contend that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*. Pacific Bell argues that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to One Call since One Call would not flow through such damages to its own customers.[10]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which One Call may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with One Call, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that One Call's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding One Call's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute One Call's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[11]

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[7] One Call also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to One Call's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] *See* Pacific Bell Motion to Dismiss at p. 6. We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

[11] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EXECULINE OF SACRAMENTO, INC.,
Complainant,

v. File No. E-90-255

NEVADA BELL,
Defendant.

ORDER

Adopted: June 16, 1992; Released: June 24, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceeding to determine whether and to what extent the complainant, Execuline of Sacramento, Inc. (Execuline), may be entitled to recover damages as a result of defendant's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that Execuline presents against the defendant local exchange carrier (LEC) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant case parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendant's liability for damages has been determined. We note that both complainant and defendant have argued the issue of liability extensively in their pleadings filed in the captioned case.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of this complaint proceeding will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Execuline's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendant's alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendant for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendant's rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does Execuline in the instant complaint, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendant, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] Execuline also seeks interest on this amount. We note that defendant argues that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is

5. The defendant raises a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. The defendant primarily argues that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[8] and, therefore, unlawful. Defendant argues that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to Execuline since Execuline would not flow through such damages to its own customers.[9]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Execuline may have suffered actual damage as a consequence of defendant's alleged violations of the Commission's rate of return prescription. We tend to agree with Execuline, in principle, that a possible measure of the damages stemming from defendant's alleged rate of return violations could be the difference between the rates it actually paid for defendant's interstate access services and the rates it would have paid if defendant's rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendant is found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendant may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of its access service offerings to establish or support its claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendant's excessive earning levels. Moreover, the defendant's factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendant that would tend to show that Execuline's share of the excessive earnings realized by defendant in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Execuline's purchase of other interstate access services from defendant for the relevant monitoring period. We will also consider any other evidence submitted by the defendant that would refute Execuline's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendant's rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendant to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendant's access services during the relevant monitoring period and the amount complainant would have paid if the defendant's rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendant the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendant.[10]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendant a written request for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendant may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendant may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendant shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendant shall submit reply briefs no later than 10 days after the submission of initial briefs.

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well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceeding will depend on the particular facts established by the parties.

[8] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[9] *See* Nevada Bell Motion to Dismiss at p. 6. We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

[10] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILLIAMS TELECOMMUNICATIONS GROUP, INC., Complainant,	
v.	
BELL ATLANTIC,	File No. E-90-444
BELLSOUTH TELEPHONE COMPANIES,	File No. E-90-445
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-446
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-447
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-448
THE OHIO BELL TELEPHONE COMPANY,	File No. E-90-449
WISCONSIN BELL, INC.,	File No. E-90-450
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-451
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-452
NEVADA BELL,	File No. E-90-453
PACIFIC BELL, and	File No. E-90-454
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-455
Defendants.	

ORDER

Adopted: June 16, 1992; Released: June 25, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Williams Telecommunications Group, Inc. (WTG), may be entitled to recover damages as a result of defendants'[1] alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that WTG presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable

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[1] Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaints, however, relate to a period prior to the consolidation. Accordingly, we shall refer to the carriers as they were named in the complaints.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] The complainants relied upon, as does WTG in the instant complaints, rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules for the relevant monitoring period. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

III. CONTENTIONS OF THE PARTIES

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. WTG's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8] WTG has asked the Commission to direct defendants to provide such computations by requesting that the Commission issue show cause orders against the defendants as it has done in the MCI and AT&T proceedings. In addition, WTG has propounded interrogatories to each defendant that asks each defendant to provide a calculation of its overearnings for each service and/or service segment that is the subject of WTG's complaints.[9] A number of defendants have opposed the interrogatory requests, which are currently the subject of motions to compel and related pleadings.[10]

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[11] The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[12] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rates of return were below the authorized level.[13] Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. Defendants contend that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*. Some defendants argue that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to WTG since WTG would not flow through such damages to its own customers.[14]

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[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[8] WTG also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] WTG uniformly conditioned its requested calculation, by asking each defendant to

> assume a study area defined by the geographical reach of [defendant's] filed tariffs, a maximum allowable rate of 12.25 percent per overall interstate earnings, and a maximum allowable rate of return for any access service category of 12.40 percent.

[10] WTG has filed motions to compel against the BellSouth Telephone Companies (BellSouth), Cincinnati Bell Telephone Company (CBT), Indiana Bell Telephone Company, Michigan Bell Telephone Company, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Southwestern Bell Telephone Company (SBT). With the exception of SBT, defendants have opposed the motions to compel. We note that, while initially objecting to the interrogatory request, BellSouth has provided answers to the interrogatories.

Additionally, we note that with respect to CBT, WTG has withdrawn that portion of its complaint dealing with interstate switched access. WTG agrees that CBT did not provide such service to WTG during the relevant period. *See* Reply to Opposition to Motion to Compel, File No. E-90-446 at n.2 (filed February 24, 1992).

[11] The issues and arguments raised by defendants in response to WTG's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[12] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[13] Additionally, the Ameritech companies contend that the relevant overall interstate rate of return is that of Ameritech in the aggregate, not each of its component operating companies. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990).

[14] *See, e.g.*, Motion to Dismiss, File No. E-90-453 (filed November 19, 1990). We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

6. Defendants also advance a number of arguments in opposition to complainant's discovery requests. Some defendants argue that the requests are premature because there has been no finding of liability.[15] Some defendants argue that providing the requested information would require them to admit a factual issue in dispute, that is, that defendants overearned.[16] Defendants maintain that they have no legal obligation to compute damages for complainant and argue that the burden is on complainant to plead and prove damages.[17]

7. WTG responds that under the holding in the *MCI Liability Order*, WTG can rely on the data in defendants' Forms 492 to make out a *prima facie* case that defendants are liable and, therefore, WTG is entitled to the requested information in order to compute damages. WTG further responds that defendants can characterize the earnings information requested by complainant as they wish; WTG is interested in the amount, not how it is labelled at this juncture. WTG further responds that the information requested is uniquely within defendants' knowledge.

IV. DISCUSSION

8. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which WTG may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with WTG, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that WTG's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding WTG's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute WTG's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

9. The defendants' argument that discovery regarding damages is premature is unavailing since we have decided not to adopt a bifurcated approach in these proceedings. Rather, as stated above, we have concluded that the parties' and the Commission's interests in obtaining the earliest practicable resolution of this matter will be better served by requiring the parties to develop a full record on the issues of liability and damages at this time. Accordingly, we will grant complainant's motions to compel to the extent indicated herein and will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 8 herein.

V. CONCLUSION

10. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will afford complainant and defendants the opportunity to engage in further discovery in these proceedings pursuant to the timetable set forth herein. Additionally, we will establish a timeframe for the filing of briefs and reply briefs by complainant and defendants.[18]

VI. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that complainants's Motions to Compel filed on December 27, 1991, January 27, 1992, February 11, 1992, and February 27, 1992, ARE GRANTED to the extent indicated herein and are otherwise DENIED.

12. IT IS FURTHER ORDERED THAT within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 9 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

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[15] *See, e.g.*, Opposition to Motion to Compel, File Nos. E-90-447, *et al.* (filed February 13, 1992).

[16] *Id.*

[17] *See, e.g.*, Opposition to Complainant's Motion to Compel, File Nos. E-90-451, *et al.* (filed February 27, 1992). We note that this pleading was filed 1 day late. As no party has objected to the late filing, the pleading is accepted.

[18] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

13. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 8 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

14. IT IS FURTHER ORDERED THAT the complainant and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-42

In the Matter of

JACK A. THOMPSON, JR.

Licensee of Station WORI(AM),
Oak Ridge, Tennessee

Order to Show Cause Why the
License for Station WORI(AM),
Oak Ridge, Tennessee, Should
Not Be Revoked

ORDER

Adopted: June 11, 1992; Released: June 24, 1992

By the Chief, Mass Media Bureau:

1. This proceeding began on March 26, 1992, when the Commission released its *Order to Show Cause and Hearing Designation Order*, 7 FCC Rcd 2130 (1992). The Commission ordered Jack A. Thompson, Jr. (hereinafter, "Thompson") to show cause why the license for WORI(AM) should not be revoked.[1] The Commission specified an issue "To determine whether Thompson has violated §§ 73.1740 and/or 73.1750 of the Commission's Rules."[2] The Commission also specified an issue to determine, in light of the evidence adduced, whether Thompson possesses the requisite qualifications to remain a Commission licensee. By *Order*, FCC 92M-536, released May 8, 1992, Presiding Administrative Law Judge Joseph Chachkin terminated the hearing proceeding because Thompson failed to file the required notice of appearance. Pursuant to § 1.92 of the Commission's Rules, the Judge also certified the case to the Commission. By letter to Mass Media Bureau Counsel, dated May 11, 1992, Thompson stated that he was relinquishing the license to WORI(AM) for cancellation, but could not find his authorization for the facility.[3] Accordingly, pursuant to Thompson's request, the Mass Media Bureau hereby cancels the WORI(AM) license and deletes the call sign.

2. Since the WORI(AM) license has been cancelled at the licensee's request, the above captioned revocation proceeding has become moot. Accordingly, the Commission hereby **ORDERS** that this proceeding is **TERMINATED.** This action is taken by delegated authority.[4]

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] Although the Commission included a *Notice of Apparent Liability* for willful or repeated violations of Commission rules, no forfeiture is being imposed because of the action taken herein.

[2] Section 73.1740(a)(4) provides:

> (4) In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

[3] Apparently the Presiding Judge's *Order* and Thompson's letter relinquishing his license crossed in the mail.

[4] The Commission has delegated authority to the Mass Media Bureau to issue revocation orders in silent station cases. See *Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACC LONG
DISTANCE CORPORATION,
Complainant,

v.

NEW YORK TELEPHONE COMPANY, and	File No. E-90-315
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, Defendants.	File No. E-90-316

ORDER

Adopted: June 17, 1992; Released: June 25, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, ACC Long Distance Corporation (ACC) may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that ACC presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. ACC's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does ACC in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circum-

the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rates of return were below the authorized level. Defendants maintain that, under *AT&T v. FCC*, they must be, allowed to offset overearnings in individual access categories against underearnings in access categories. Defendants contend that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which ACC may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with ACC, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that ACC's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding ACC's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute ACC's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[10]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

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stances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] ACC also seeks interest on this amount. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to ACC's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG DISTANCE SAVERS, INC.,
Complainant,

v. File No. E-91-117

SOUTH CENTRAL BELL
TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: June 17, 1992; Released: June 24, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceeding to determine whether and to what extent the complainant, Long Distance Savers, Inc. (LDS), may be entitled to recover damages as a result of defendant's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that LDS presents against the defendant local exchange carrier (LEC) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant case parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendant's liability for damages has been determined. We note that both complainant and defendant have argued the issue of liability extensively in their pleadings filed in the captioned case.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of this complaint proceeding will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. LDS' damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendant's alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendant for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendant's rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does LDS in the instant complaint, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendant, should they choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] LDS also seeks interest on this amount. We note that the defendant argues that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant proceeding will depend on the particular facts established by the parties.

5. The defendant raises a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. The defendant argues that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[8] and, therefore, unlawful. Defendant contends that the fact that its rates produced overearnings in one access service category is not sufficient to establish damage to the complainant.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which LDS may have suffered actual damage as a consequence of defendant's alleged violations of the Commission's rate of return prescription. We tend to agree with LDS in principle, that a possible measure of the damages stemming from defendant's alleged rate of return violations could be the difference between the rates it actually paid for defendant's interstate access services and the rates it would have paid if defendant's rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendant is found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendant may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of its access service offerings to establish or support its claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendant's excessive earning levels. Moreover, the defendant's factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendant that would tend to show that LDS' share of the excessive earnings realized by defendant in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding LDS' purchase of other interstate access services from defendant for the relevant monitoring period. We will also consider any other evidence submitted by the defendant that would refute LDS' claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendant's rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendant to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendant's access services during the relevant monitoring period and the amount complainant would have paid if the defendant's rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendant the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendant.[9]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendant a written request for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendant may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendant may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendant shall file their initial briefs no later than 20 days after the close of the thirty day discovery period and that complainant and defendant shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

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[8] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[9] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS COMMUNICATIONS, INC., Complainant,	
v.	
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-428
BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-429
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-90-430
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-431
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-432
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-433
DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-434
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-435
NEW YORK TELEPHONE COMPANY,	File No. E-90-436
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-439
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-440
THE OHIO BELL TELEPHONE COMPANY,	File No. E-91-19
WISCONSIN BELL, INC.,	File No. E-91-20
PACIFIC BELL	File No. E-91-21
TELEPHONE COMPANY, NEVADA BELL,	File No. E-91-22
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-23
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-91-24
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-91-25
CINCINNATI BELL TELEPHONE COMPANY, and	File No. E-91-26
GTE SOUTHWEST, INC., Defendants.	File No. E-91-27

ORDER

Adopted: June 17, 1992; Released: June 24, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Cable & Wireless Communications, Inc. (Cable & Wireless), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that Cable & Wireless presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued or-

[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order), recon. denied,* 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order), appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does Cable & Wireless in the instant complaints, on rate of return monitoring reports (Form

ders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Cable & Wireless' damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*[8] The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant. Some defendants contend that damages cannot be awarded on an access category level when their overall interstate rates of return were below the authorized level.[10] Several of the defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories.[11] Some defendants contend that an award of damages based on the measure advocated by the complainant would result in the same consequences as the automatic refund rule found unlawful in *AT&T v. FCC*.[12]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Cable & Wireless may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Cable & Wireless in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized

492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order)* and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendants, should they choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] Cable & Wireless also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to Cable & Wireless' claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC)*. The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] Additionally, the Ameritech operating companies argue that the relevant overall interstate rate of return is that of the holding company, Ameritech, in the aggregate, not each of its component operating companies. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See e.g.*, 5 FCC Rcd 146 and 148 (1990). We find that the Commission's ruling is equally applicable to the defendants in this proceeding.

[11] *See e.g.*, Southwestern Bell Telephone Company Motion to Dismiss at 4; Cincinnati Bell Telephone Company Motion to Dismiss at 9.

[12] *See e.g.*, The Ohio Bell Telephone Company Motion to Dismiss at 4; GTE Southwest, Inc., Answer at Par. 13.

levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that Cable & Wireless' share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Cable & Wireless' purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute Cable & Wireless' claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[13]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[13] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTINGHOUSE COMMUNICATIONS,
a division of
WESTINGHOUSE ELECTRIC CORPORATION,
Complainant,

v.

THE BELL ATLANTIC TELEPHONE COMPANIES,	File No. E-91-125
NEW YORK TELEPHONE COMPANY,	File No. E-91-126
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-127
THE OHIO BELL TELEPHONE COMPANY,	File No. E-91-128
PACIFIC BELL TELEPHONE COMPANY, and	File No. E-91-129
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-130

Defendants.

ORDER

Adopted: June 17, 1992; Released: June 25, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Westinghouse Communications, a division of Westinghouse Electric Corporation (WCS), may be entitled to recover damages as a result of defendants'[1] alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that WCS presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

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[1] The Bell Atlantic Telephone Companies are: Bell Telephone Company of Pennsylvania; Diamond State Telephone Company; New Jersey Bell Telephone Company; and the Chesapeake & Potomac Telephone Companies.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] The complainants relied, as does WCS in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal.

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. WCS' damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[9] The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[10] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rates of return were below the authorized level.[11] Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. Some defendants contend that there is no significant difference between an award of damages based on the measure advocated by the complainant and the automatic refund rule found unlawful in *AT&T v. FCC*.[12]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which WCS may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with WCS in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainants suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that WCS' share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding WCS' purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute WCS' claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at

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Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[8] WCS also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant proceedings will depend on the particular facts established by the parties.

[9] The issues and arguments raised by defendants in response to WCS' claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[11] Additionally, The Ohio Bell Telephone Company argues that the relevant overall interstate rate of return is that of the holding company, Ameritech, in the aggregate, not each of Ameritech's component operating companies. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*, *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990). We find that the Commission's ruling is equally applicable to the defendant in this proceeding.

[12] *See, e.g.*, New England Telephone and Telegraph Company Motion to Dismiss at 4-5; New York Telephone Company Motion to Dismiss at 4-5.

the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[13]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[13] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Dan S. Bagley, Jr. File No. 1025-CM-P-80

For Authority to Construct
and Operate a Multipoint
Distribution Service station
on Channel 1 at Lakeland, Florida

MEMORANDUM OPINION AND ORDER

Adopted: June 18, 1992; Released: June 24, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Contemporary Communications Corporation (Contemporary) and Pompano Corporation (Pompano) filed separate petitions to dismiss the above-referenced application of Dan S. Bagley, Jr. (Bagley) to construct and operate a Multipoint Distribution Service (MDS) station on Channel 1 at Lakeland, Florida. Bagley filed separate oppositions. Contemporary and Pompano filed replies.

2. *Contemporary Pleadings.* Contemporary argues that Bagley's application should be dismissed because the application was filed after the relevant cut-off date for Contemporary's previously-filed MDS application (Application File No. 5579-CM-P-72). Contemporary's application proposed a station transmitter site at Orlando, Florida, within 50 miles of Bagley's proposed transmitter site. Contemporary's petition included an engineering study of electrical conflicts between Bagley's proposed station and Contemporary's proposed station.

3. Bagley, in his opposition, states that it has a duty to cooperate in resolving problems of harmful interference. Bagley argues that Contemporary's calculation of the radio horizon for Bagley's station is incorrect, and that, if the potential for harmful interference exists, Contemporary's competing applicants would also have filed petitions to dismiss Bagley's application.

4. Contemporary's Reply contains, *inter alia,* the following language:

> Bagley's Opposition...indicates that the actual horizon toward Orlando is 25 miles. This horizon calculation was apparently based on a Lakeland transmit antenna with a center line of 138 feet above ground level. The Lakeland antenna site, however, sits on a hill 219 feet AMSL....With a receive antenna height of 30 feet, the calculated radius horizon has a 4/3 earth radius curvature of 30.4.
>
> Using the existing antenna height above average terrain the interference showing as submitted [by Contemporary], is correct.

Contemporary Reply at 1-2. Contemporary also explains that the reason no competing applicants for an MDS station at Orlando filed petitions to dismiss Bagley's application is due to the fact that all competing applications had been dismissed.

5. *Pompano Pleadings.* Pompano argues that Bagley's application should be dismissed because it is mutually-exclusive with a modification application filed by Pompano to increase the power level of its previously-licensed MDS station and Bagley's application was filed long after the end of the cut-off period for this modification application. *See* 47 C.F.R. Sec. 21.31. Pompano's previously-licensed MDS station (WOF43) at Tampa, Florida is 31.4 miles from Bagley's proposed transmitter site. Pompano's petition includes an engineering study.

6. In dismissing Pompano's engineering study, Bagley states that Pompano used an incorrect antenna type and antenna gain pattern. Also, Bagley argues his application is not mutually-exclusive with Pompano's licensed MDS station because, in any consideration of electrical conflicts, pursuant to 47 C.F.R. Sec. 21.31, it must be assumed that Bagley will cooperate by reducing or eliminating harmful interference with Pompano's licensed station.

7. Pompano states in reply:

> Bagley's Opposition alleges that Pompano Corp. made its interference calculations on the basis of the wrong antenna. This argument merely underlines the inadequacy of Bagley's application. The antenna type specified by Bagley was a vertically-polarized cardioid antenna. However, since Bagley's application proposed horizontal polarization and no directional azimuth, Pompano Corp. assumed that the proposal was for omnidirectional operation and that the antenna type had been a typographical error.
>
> It appears from Bagley's Opposition that Bagley is proposing a directionalized, horizontally polarized antenna having an azimuth of 60 deg. This information either directly contradicts the application as submitted or is completely omitted from it.

Pompano's Reply at 1.

8. *Discussion.* At the time Bagley filed his application, 47 C.F.R. Sec. 21.902(c) required him to submit with his application an analysis of the potential for harmful interference with any other authorized or previously-proposed, cochannel or adjacent-channel station located within 50 miles. Based on the pleadings before us, among other requirements and analyses, Bagley was required to submit as part of his application at least two analyses: (1) an analysis of Pompano's previously-proposed 100-watt MDS station (modification application), and (2) an analysis of Contemporary's previously-proposed MDS station. Both the Pompano and Contemporary applications were within 50 miles of Bagley's proposed transmitter site.

9. We have reviewed the analyses submitted by Bagley. Bagley failed to mention or file any analysis as to the potential for harmful interference to Contemporary's previously-proposed MDS station at Orlando. In addition, Bagley failed to file any analysis as to the potential for

harmful interference to Pompano's station operations at Tampa for the previously-proposed power level of 100 watts.[1]

10. Due to the failure to submit required interference analyses in Bagley's application, the Commission staff lacked information necessary for the initial processing of this application. Due to these deficiencies in Bagley's application, it was not possible for Commission staff to make initial mutual-exclusivity and cut-off determinations. In the processing of MDS station applications, the interference analyses required by 47 C.F.R. Sec. 21.902 are crucial. We find that Bagley's application failed to substantially-comply with Commission rules and is defective. At the time Bagley's application was filed, 47 C.F.R. Sec. 21.20(a) stated as follows:

> Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant with a brief statement as to the omissions or discrepancies if:
>
> (1) The application is defective with respect to completeness of answers to questions, informational showings, execution, or other matters of a formal character; or
>
> (2) The application does not substantially comply with the Commission's rules, regulations, specific requests for additional information, or other requirements.

See 47 C.F.R. Secs. 21.13(a)(3) and (6); 21.13(c)(1); 21.15; and 21.902(c); *see also* 47 C.F.R. Secs. 21.13(c), 21.20(d) and 21.28.

11. *Conclusion.* After careful consideration of Bagley's application and pleadings filed related to that application, we determine that Bagley's above-referenced application is unacceptable for filing pursuant to 47 C.F.R. Sec. 21.20(a) and it will be returned to the applicant. *See* 47 C.F.R. Sec. 21.26. Accordingly, to the extent described in this order, the Petitions to Dismiss filed by Pompano Corporation and Contemporary Communications Corporation ARE GRANTED and in all other respects ARE DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec. 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] In his application, Bagley did discuss the effect on the operation of its own proposed station at Lakeland if Pompano's 100-watt modification application would be granted.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application of

GENERAL TELEPHONE
COMPANY OF CALIFORNIA

For authority pursuant to Section 214 of the Communications Act of 1934 and Sections 63.01 and 63.57 of the Commission's rules and regulations to construct and maintain broadband transport facilities in Cerritos, California; — File No. W-P-C-5927

and

For authority pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's rules and regulations to construct, operate and maintain broadband transport fiber optic facilities in Cerritos, California — File No. W-P-C-6250

ORDER

Adopted: June 17, 1992; Released: June 24, 1992

Comment Date: July 14, 1992
Reply Comment Date: July 24, 1992

By the Commission:

I. INTRODUCTION

1. In September 1990 the United States Court of Appeals for the District of Columbia Circuit remanded this case to the Commission for further proceedings.[1] The Commission's remanded decision, *General Telephone Co. of California*, 4 FCC Rcd 5693 (1989) (*Cerritos Order*), granted GTE California Incorporated ("GTECA")[2] authority to construct and operate cable television distribution facilities in Cerritos, California, for the local cable television franchisee, Apollo Cablevision. It further authorized GTECA to establish an optical fiber/coaxial cable experimental "test bed" to engage in a comparative technical and market analysis on a wide range of transmission services. The Commission granted GTECA a temporary, conditional waiver of the FCC's telephone company/cable television cross-ownership rules[3] on the basis of a finding that technological and marketing innovation met the criteria for a good cause waiver. The Court of Appeals, on review, found the Commission's justification for the good cause waiver inadequate and remanded the *Cerritos Order* "for further appropriate proceedings."[4]

2. The Commission has worked with the parties to this proceeding during the past year and a half in an effort to reach a settlement of the dispute. At this time, it appears that further negotiations will not lead to a resolution of the matter. Therefore, we seek comment from the parties to this proceeding as to what further action the Commission should take in light of the court's remand.

II. BACKGROUND

3. In 1985, the city of Cerritos, located outside of Los Angeles, issued a Request For Proposals (RFP) for the construction and operation of an underground, state-of-the-art cable communications system. Apollo Cablevision (Apollo) and GTECA joined in designing a proposal that successfully bid for the city cable television franchise. Under the plan, GTECA would construct a system of coaxial cable and fiber optic cable for the city and Apollo would lease half of the capacity on the coaxial system for delivery of its video entertainment programming. GTE Service Corporation, GTECA's affiliate, would lease the other half of the coaxial facilities and all of the capacity on the fiber system to conduct experiments regarding the feasibility of bringing fiber to the home. The Apollo/GTECA proposal also provided for Apollo's corporate parent, T.L. Robak, Inc., to construct the facilities pursuant to a construction contract between Robak and GTECA.

4. Following the grant of the franchise by the city of Cerritos, GTECA filed an application with the Commission for authorization to build and operate the system. The Commission granted a temporary, conditional waiver of the telephone company/cable television cross-ownership rules, finding that good cause existed to take such action, as well as granting GTECA's application for Section 214 authority to construct and operate the Cerritos facilities.[5] The National Cable Television Association (NTCA) sought appellate review of the Commission's *Cerritos* decision; upon review, the D.C. Circuit remanded the case to the FCC for further proceedings.

III. DISCUSSION

5. To assist the Commission in resolving this remand proceeding, we ask the parties to submit views as to what further action the Commission should take at this time. We specifically seek comment on whether the affiliation that created the need for a waiver -- the construction contract between GTECA and Robak (Apollo's corporate parent) -- exists today and the extent, if any, of Robak's continuing role in the Cerritos project. In this connection, we seek comment on what action may be appropriate at this time with respect to the Cerritos project if we conclude that the affiliation between GTECA and Robak ended with the completion of construction by Robak.

6. Comments from existing parties to this proceeding are due no later than **July 14, 1992** and reply comments, if any, may be filed no later than **July 24, 1992.**

7. An original and five copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial firm for copying, Downtown Copy Center, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Parties are also requested to deliver a courtesy copy to the Domestic

Facilities Division, Common Carrier Bureau, Room 6010, 2025 M Street, N.W., Washington, D.C. 20554, and the Administrative Law Division, Office of General Counsel, Room 616, 1919 M Street, N.W., Washington, D.C. 20554.

8. This is a non-restricted proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* Sections 1.1200, *et seq.*, of the Commission's Rules, 47 C.F.R. 1.1200, *et seq.*

IV. ORDERING CLAUSE

9. ACCORDINGLY, IT IS ORDERED, that existing parties to this proceeding ARE REQUESTED to file comments in accordance with paragraph 7, above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See National Cable Television Ass'n v. FCC, as amended on denial of rehearing and rehearing en banc*, 914 F.2d 285 (D.C. Cir. 1990).

[2] GTE California Incorporated was formerly called General Telephone Company of California.

[3] 47 C.F.R. §§ 63.54-63.56 (1991).

[4] 914 F.2d at 290.

[5] *Cerritos Order*, 4 FCC Rcd at 5694. The Common Carrier Bureau, in a prior decision, granted GTECA's Section 214 application and waived the telephone company/cable television cross-ownership rules. *See General Telephone Co. of California*, 3 FCC Rcd 2317 (Com.Car.Bur. 1988). Upon review, the Commission in the *Cerritos Order* affirmed the grant of Section 214 authority to GTECA but vacated the waiver contained in Bureau's Order and granted a waiver *de novo* on different grounds.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-33

In the Matter of

Petitions for Rule Making
Concerning Proposed Changes
to the Commission's Cellular
Resale Policies

REPORT AND ORDER

Adopted: May 14, 1992; Released: June 8, 1992

By the Commission:

I. INTRODUCTION

1. In our Notice of Proposed Rule Making and Order (*Cellular Resale NPRM/Order*), 6 FCC Rcd 1719 (1991), we proposed to modify our current policy governing resale of cellular service. We sought comments on whether we should no longer require a facilities-based cellular carrier to provide resale capacity to its facilities-based competitor in the same market after the competitor is fully operational. Numerous parties filed comments[1] and reply comments,[2] the majority of whom express support for our tentative conclusions. Based on our analysis of the issues and comments, we are adopting our proposal to allow a licensee to deny resale capacity to its facilities-based competitor in the same market after that competitor's five-year fill-in period has expired.[3] At that time, a carrier requesting resale capacity from its competitor will have had an oportunity to build out its system and become fully operational. The *Cellular Resale NPRM/Order* also clarified the requirement that resale capacity be provided on a non-discriminatory basis. We are also herein denying an application for review of a Common Carrier Bureau order, 6 FCC Rcd 4827 (Com. Car. Bur. 1991), denying a motion for stay pending judicial review of this non-discrimination requirement.[4]

II. BACKGROUND

2. In *Resale and Shared Use of Common Carriers Services and Facilities*, 60 FCC 2d 261 (1976) (*Resale and Shared Use Decision*), *modified on other grounds* (*Resale and Shared Use Reconsideration Order*), 62 FCC 2d 588 (1977), *aff'd sub nom. AT& T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978), the Commission held that provisions in carrier tariffs which had the effect of precluding the resale of private line services were unlawful. In establishing this policy, the Commission found that tariff provisions restricting interstate resale[5] were "unjust and unreasonable" in violation of Section 201(b)[6] of the Communications Act of 1934, as amended, (the Act) and "unlawfully discriminatory" under Section 202(a)[7] of the Act. The Commission further advanced the resale policy in *Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 FCC 2d 167, 193 (1980) (*Resale of Switched Services*). In that decision, the Commission adopted a blanket prohibition on tariff provisions restricting the resale of common carriers' domestic public switched network services, finding such restrictions to be unlawful under Sections 201(b) and 202(a) of the Act.

3. The Commission extended the resale policy to cellular service in *Cellular Communications Systems*, 86 FCC 2d 469, 511 (1981) (*Cellular Report and Order*), *modified*, 89 FCC 2d 58 (1982) (*Reconsideration Order*), *further modified*, 90 FCC 2d 571 (1982) (*Further Reconsideration Order*), *appeal dismissed sub nom. U.S. v. FCC*, No. 82-1526 (D.C. Cir. March 3, 1983). In that decision the Commission found that restrictions on cellular resale were contrary to the public interest, relying on the reasons set forth in the *Resale and Shared Use Decision* and *Resale of Switched Services*. Pursuant to Section 309 of the Act,[8] the Commission stated that it would grant cellular radio licenses on the condition that no restrictions on resale be imposed.[9]

III. PROVISION OF RESALE CAPACITY TO A FACILITIES-BASED CARRIER

A. Background/Proposal

4. On March 14, 1986, Cellular Telephone Company (CTC), the nonwireline licensee in New York City, filed a petition requesting a declaratory ruling that it and other nonwireline cellular carriers should not be required to provide resale service to the wireline cellular competitor in the same market. The Bureau initially concluded that CTC was required to provide resale capacity to its facilities-based competitor.[10] The Commission, by *Memorandum Opinion and Order*, 3 FCC Rcd 6274 (1988) (*CTC/NYNEX Order*), affirmed the Bureau's decision. However, in response to comments filed by CTC and the Department of Justice (DOJ), the Commission in the *CTC/NYNEX Order* indicated that it would be worthwhile to review its resale policy by treating the comments filed by CTC and the DOJ as petitions for Rule Making. It also invited comments concerning the extent to which it should apply its resale policy.

5. In the *Cellular Resale NPRM/Order*, which constituted the Rule Making proceeding initiated in response to the CTC and the DOJ comments, the Commission stated that it continued to support the policy prohibiting restrictions on cellular resale in most instances. The Commission indicated, however, that its policy requiring the two facilities-based carriers to provide resale capacity to each other serves the public interest only until both facilities-based carriers are fully operational. The Commission explained that an important public interest reason for prohibiting resale restrictions is to offset any competitive advantage one carrier may have because it was granted a construction permit prior to its competitor. However, once the second carrier is fully operational, the Commission continued, the rationale for prohibiting resale restrictions between facilities-based licensees may cease to exist.

6. The Commission in the *Cellular Resale NPRM/Order* sought comment on a proposed rule providing that a licensee must permit resale of its services in all circumstances, except to its facilities-based competitor in the same market after that competitor is fully operational.[11] The

Commission stated that its proposal would promote the Commission's goal of establishing nationwide availability of cellular service by encouraging carriers to build out their systems, promoting efficient allocation of spectrum resources and interbrand competition between the two carriers in the market.[12] Finally, the Commission tentatively concluded that resale restrictions on a fully operational facilities-based cellular carrier were just and reasonable under Section 201(b) of the Act and would not constitute unjust and unreasonable discrimination in violation of Section 202(a) of the Act. It emphasized that while resale restrictions in general are unreasonably discriminatory, a limited exception to the general restriction was justified in view of the goal of stimulating interbrand competition and efficient use of spectrum.

B. Discussion

Provision of Resale Capacity to a Fully Operational Carrier

7. Most of the parties, including the Department of Justice, generally agree with the Commission's proposal and tentative conclusions. They support the notion that maintaining the resale requirement until both carriers are fully operational helps mitigate any disadvantage a second carrier may incur during the "headstart"[13] period.[14] They also agree with the Commission that once the second carrier is fully operational, the rationale for prohibiting resale restrictions between facilities-based carriers ceases to exist. Furthermore, they agree that terminating the resale requirement after both carriers are fully operational would promote interbrand competition, expedite expansion of both licensees' coverage areas, and spur the deployment of spectrum-efficient technology. These parties believe that the public interest is best served when the two facilities-based carriers in each market are competing against each other to the fullest extent possible. They point out that fully operational facilities-based carriers who can obtain resale capacity from the other carrier in the same market may rely on their competitor's efforts and defer making capital expenditures to expand their systems. In addition, Bell Atlantic, Southwestern Bell and others point out that the possibility of abuse under the current unrestricted resale policy may increase with the introduction of digital technology because, they say, some carriers may not want to invest initially in digital technology and may postpone the installation of digital equipment, allowing their competitors to absorb the substantial initial investment costs.[15]

8. NYNEX, the Michigan Public Service Commission Staff (Michigan PUC Staff) and the New York State Department of Public Services (NYPS) disagree with the Commission's proposal to modify the resale requirement with respect to facilities-based carriers. They argue that there are no public interest factors that warrant any modification of the current resale policy.[16] NYNEX asserts that the Commission's cellular regulatory policies and market safeguards already ensure that carriers will make the necessary investments to build out their systems.[17] For its part, NYPS contends that no evidence has been introduced to show that allowing carriers to restrict resale capacity to their facilities-based competitor will promote interbrand competition. In addition, it argues that no evidence has been introduced showing that the Commission's current resale policy adversely affects the public interest. Specifically, it asserts that there is no showing that a limited restriction on resale can reduce or eliminate anticompetitive behavior on the part of the two facilities-based carriers in a market.[18] To the contrary, it points out that its own experience in the State of New York has shown that unrestricted resale has resulted in no adverse impact on competition.[19] Thus, NYPS maintains that the parties supporting resale restrictions have failed to satisfy their burden of proving such restrictions are just and reasonable under Section 201(b) of the Act.[20]

9. NYPS further opposes any modification to the current resale requirement because it is concerned that cellular resale restrictions might adversely affect the provision of future wireless technologies, such as personal communications services (PCS). It argues that if a facilities-based cellular carrier is permitted to provide PCS in its existing market, it might obtain a competitive advantage over the second carrier in the market if that carrier is slow in introducing PCS. For its part, the Michigan PUC believes that the proposed resale restriction does not promote the Commission's goal of establishing nationwide availability of cellular service. Rather, it believes that the Commission could best accomplish this goal by mandating that facilities-based carriers use the frequencies awarded to them to the maximum degree under a "use it or lose it" policy. Under this policy, The Michigan PUC maintains that the FCC would be required to develop a comprehensive monitoring system to assure maximum usage of the frequencies, and failure to utilize these frequencies to the maximum degree would result in the subdivision of these frequencies to competitors.[21] Finally, NYNEX asserts that if the Commission modifies its cellular resale policy, there should be some assurance that existing supplier-customer arrangements are not disrupted. Thus, it continues, the licensee requesting resale should be permitted to continue to serve its customers using its competitor's system on a "grandfathered" basis.[22]

10. In the *Cellular Resale NPRM/Order*, the Commission indicated that once the second carrier in a market is fully operational, the rationale for prohibiting resale restrictions between facilities-based carriers, i.e., to offset any competitive advantage one carrier may have because it is granted a construction permit prior to its competitor, ceases to exist. In addition, the Commission pointed out that elimination of the resale requirement to a fully operational facilities-based competitor (1) promotes the maximum amount of competition between the two facilities-based carriers in the market; (2) promotes the Commission's goal of establishing nationwide availability of cellular service by encouraging carriers to build out their systems; (3) encourages the fullest possible utilization of the radio spectrum allocated to cellular service; and (4) discourages the carrier requesting resale from its competitor from permanently relying on its competitor's facilities and efforts.

11. As noted above, the majority of the commenters agree that the elimination of the resale requirement to a fully operational facilities-based competitor will promote consumer welfare and will benefit competition. As the DOJ pointed out, the Commission's prohibition of resale restrictions with respect to facilities-based competitors was intended in part to offset the "headstart" enjoyed by the carrier that first obtained a construction permit. After a carrier has fully built its facilities-based system, DOJ explains, there is no longer any need for concern about a carrier's "headstart" and the justification for continuing competitor resale ceases to exist.[23] The DOJ further states that "the Commission's policies should be designed to allow the maximum amount of competition between the

two facilities-based licensees in a market, supplemented by the additional competition resellers may provide." As discussed below, requiring a facilities-based competitor to resell capacity to its facilities-based competitor after both are fully operational can dampen the incentive to compete aggressively.

12. We disagree with NYNEX that the proposal is unnecessary because licensees already have an incentive to build out their own systems. While we agree that licensees have some operational and economic incentives promptly to construct their own systems and to build them out, we believe that the adoption of our proposal to limit the purview of resale from facilities-based competitors would further stimulate these incentives, encourage these carriers to build out their facilities fully and promote the maximum amount of facilities-based competition in each market. This is so because it eliminates the ability of a licensee to delay or decline construction in a particular area within its Cellular Geographic Service Area (CGSA) and rely on its competitor's facilities instead after their own five-year fill-in period expires. In addition, without eliminating competitor resale, one carrier could convert to digital facilities, while its competitor simply piggy-backed on these investments through resale. Eliminating competitor resale after both carriers are fully operational will promote full and therefore more efficient use of the spectrum assigned to each carrier. Full facilities-based competitors in each cellular service market better serves the public interest than partial reliance in resale because it promotes greater competition between the carriers.

13. We also disagree with the Michigan PUC that our proposed resale restriction does not promote the Commission's goal of establishing nationwide availability of cellular service. Our proposed resale restriction encourages the two competing facilities-based carriers in each market to build our their systems as expeditiously as possible. In turn, this market-by-market build out should result in the creation of a seamless and integrated nationwide cellular service system. Futhermore, we agree with the Michigan PUC's comments concerning the Commission's need to ensure that the assigned spectrum is used efficiently and we believe that our decision here furthers that goal by encouraging carriers to build out their systems. Moreover, our current cellular rules allowing competitors to file "fill-in" applications for unserved areas within a licensee's MSA or RSA already promote a type of "use it or lose it" policy. Because the elimination of the resale requirement for facilities-based competitors will encourage complete system build out, we do not beieve that it is necessary to adopt the Michigan PUC's comprehensive monitoring proposal.

14. Thus, contrary to the position taken by the NYPS and others, we believe continuation of the existing unrestricted resale policy for licensees after the five-year period expires does not serve the public interest. In any event, even if we were to agree that this rule change will have little impact, there will be no adverse consequences by eliminating competitor resale by a fully operational competitor. As the DOJ points out, once the five-year fill-in period expires and both carriers in a market have built out their systems the Commission's duopoly market structure has been achieved and while further building out of systems, as encouraged here, may be appropriate, there is no reason to require one carrier to continue providing resale capacity to the other. In this regard, NYNEX and NYPS acknowledge that, historically carriers have purchased capacity from their facilities-based competitors prior to expansion of their own facilities but have done so only as an interim practice.[24] They further acknowledge that once carriers' systems become operational, carriers naturally seek to transfer their customers to their own systems. Finally, we do not dispute the NYPS argument that its own experience in the State of New York shows that unrestricted resale has had no adverse impact on competition. However, we believe that on a national level, unrestricted resale potentially can adversely impact competition in the cellular industry by limiting facilities-based competition. If one carrier were permitted to rely permanently on reselling a competitor's service, there are potential anticompetitive consequences. A permanent resale relationship increases opportunities to engage in joint anticompetitive agreements and to obtain competitively sensitive information. For these reasons, we agree with the DOJ and the majority of the commenters that the current regulations requiring unrestricted resale to a fully operational facilities-based carrier do not promote the public interest.[25]

Compliance with Section 201 (b) of the Act

15. We disagree with NYPS that a rule allowing a carrier to deny resale capacity to a fully operational facilities-based competitor would violate the just and reasonable standard of Section 201(b). The Commission stated in the *Resale and Shared Use Decision* that in determining whether resale restrictions are just and reasonable under Section 201(b), we must weigh any adverse impact on the public against the countervailing benefits to the public. *Resale and Shared Use Decision*, 60 FCC 2d 281-83. *See also Hush-a-Phone Corp. v. U.S.*, 238 F.2d 266 (D.C. Cir. 1956). Applying this test, the weight of the record shows that unrestricted competitor resale may have the effect of inhibiting facilities-based competition in the cellular service by encouraging a carrier to rely on its competitor's facilities. Moreover, the record indicates that unrestricted resale may lead to delays in the conversion to digital technology. Because of the substantial investments required to convert to digital technology, some carriers may simply rely on their competitor's efforts by reselling their digital service. Concomitantly, as the DOJ has pointed out, allowing carriers to deny resale to their fully operational facilities-based competitor further enhances the competitive nature of the duopoly cellular market structure. Finally, as the cellular industry matures and carriers build out their systems, we continue to believe that maintaining mandatory resale might create the potential for collusion in the areas to be served by the two carriers. Therefore, we conclude that the limited exception to the resale policy noted above will serve the public interest and such a limited exception is just and reasonable under the Section 201(b) standard.

Compliance with Section 202 (a) of the Act

16. We also find that resale restrictions as applied to a fully operational facilities-based cellular carrier do not violate Section 202(a) of the Act. As the Commission noted in the *Cellular Resale NPRM/Order*, while we agree with those parties who argue that resale restrictions in general are unreasonably discriminatory, we believe that making a limited exception to the general resale restriction is justified in view of our goal of stimulating interbrand competition and promoting more efficient use of the cellular radio spectrum already assigned to specific carriers. The Commission further explained that from the begin-

ning, our rules for the cellular service have provided facilities-based carriers both with comparable radio spectrum and service area. Thus, both licensed carriers have an opportunity to serve the market. In addition, fully operational facilities-based cellular carriers differ from other cellular resellers because only those carriers that are Commission licensees can bring into use spectrum that is allocated for cellular service. However, competition in the resale market depends upon the cellular licensee's construction of its facilities. Thus, we conclude that resale restrictions, as applied to a fully operational facilities-based carrier for this radio service, would not constitute unjust and unreasonable discrimination in violation of Section 202(a) of the Act. We emphasize, however, that we continue to support our current policy prohibiting restrictions on cellular resale in all other instances.

The Most Appropriate Time to Cease Competitor Resale

17. The Commission tentatively concluded in the *Cellular Resale NPRM/Order* that the most appropriate time to cease the competitor resale requirement should be at the end of the five year fill-in period for the facilities-based carrier seeking to resell its competitor's capacity. By then, that carrier will have had an adequate opportunity to build out its system and compete using its own facilities.

18. Some of the commenters agree with the Commission's tentative conclusions and the proposal to terminate the competitor resale obligation after the five year fill-in period for the licensee requesting resale has expired.[26] A few of these parties recommend the the proposal be modified slightly. For example, ALLTEL recommends that the Commission adopt a rule that permits a carrier to impose resale restrictions after the facilities-based carrier requesting resale is fully operational in the MSA or RSA.[27] Vanguard asserts that the only exception to terminating competitor resale after the five year fill-in period has expired should be when a carrier, through circumstances beyond its own control, is unable to secure a cell site location to provide service to a portion of the MSA or RSA served by its competitor. In such a case, Vanguard recommends that after the five year period has expired, a facilities-based carrier providing full service throughout the MSA or RSA, but unwilling to permit its facilities-based competitor to co-locate on its tower, should be required to permit its competitor to resell its cellular service.[28] Finally, BellSouth recommends that the Commission clarify how the proposed rule would apply in markets where the licensees operate several systems as one system. It suggests that the proposed rule be amended to clarify that resale is mandated for five years for each individually licensed system or portion of a wide area system.[29]

19. Several of the commenters believe that the resale obligation should terminate prior to the expiration of the five-year fill-in period. PacTel, for example, suggests that the Commission adopt the California Public Utilities Commission model, which allows a carrier 120 days after the 18 month construction period expires or, in any event, no longer than three years after a construction permit is issued, to switch its resale customers to its own system.[30] GTE and Contel propose that the competitor resale requirement be lifted 30 months following the grant of the construction permit for the second carrier's system.[31] The Rural Telephone Coalition recommends that competitor resale should not be required after the end of the 18 month deadline for initiating service to the public.[32] McCaw/LIN proposes that the competitor resale obligation end two years after the carrier seeking resale capacity files its FCC Form 489 for initial service.[33] For its part, Southwestern Bell proposes that the competitor resale requirement end two years from the date of issuance of a construction permit or when the carrier seeking resale has already constructed a system that provides coverage to 60% of its licensed market, whichever is shorter.[34] While all these parties agree that maintaining the resale requirement until both carriers are fully operational serves the public interest, they suggest that the proposal to establish the five year fill-in period as the point when a carrier is considered to be fully operational, establishes a time period that is longer than necessary. They argue that terminating competitor resale at the end of a carrier's five year fill-in period is counter productive to the public interest goals of: (1) encouraging the build-out of systems in the most efficient manner; (2) promoting the cellular industry duopoly market structure; (3) establishing nationwide availability of service to the public; and (4) encouraging carriers to invest in innovative and technologically superior systems. Finally, other parties, such as CTIA, express no view as to what constitutes the most appropriate time to cease the competitor resale requirement.[35]

20. On balance, the record before us leads us to adopt the five year fill-in period for terminating mandatory resale to a facilities-based competitor. As the Commission noted in the *Cellular Resale NPRM/Order*:

> [a]t some point, however, the second carrier will have had sufficient opportunity to build out its system. This point in time will vary from market to market depending on many factors, including the length of the time lag, state or local zoning approval delays, weather and site availability for additional transmittal locations, to name just a few.

In view of the existence of these factors, we believe that the public interest would best be served by adopting a rule that takes these factors into account and allows facilities-based carriers adequate time to build out their systems fully, while, at the same time, establishing a date certain to terminate competitor resale. We believe the five-year period best serves these goals.[36] In this regard, the selection of the five-year period as the point for terminating competitor resale is based on the Commission's prior determination to permit licensees to expand their systems for five years from the date the original construction authorization was granted in the market without competing applications.[37] The record does not support establishing any cut-off period for competitor resale other than the five-year fill-in period. The Commission provided flexibility to cellular carriers to construct their systems for five years. Eliminating competitor resale prior to the five years could interfere with this flexibility. In addition, a shorter time period could disadvantage a second carrier in the market which received an authorization substantially later than the first carrier. The second carrier deserves the full five-year fill-in period to which it is entitled. Granting carriers a five year period during which they may resell their competitor's service is consistent with the Commission's current rules and policies not affected here.[38] Finally, we agree with Vanguard and BellSouth that the proposed rule should clarify when the five year fill-in period has run where licenses for several systems are operated as one wide area system. Therefore, we will amend the proposed rule to make clear that competitor

resale is required for five years for each individually licensed cellular system or portion of a wide area cellular system corresponding to a Commission defined market area. For these reasons, we find that the public interest will be served by adoption of our rule essentially as proposed.

21. Finally we emphasize that the narrow resale restriction which we adopt today applies only to the provision of cellular service. Our action today is not intended to apply to any other current services or to other future technologies, such as PCS.

IV. APPLICATION FOR REVIEW

22. On May 24, 1991, Cellnet Communications, Inc. (Cellnet), a reseller of cellular service in the Detroit-Ann Arbor, Michigan area, filed a Motion for Stay of Clarification (Motion for Stay), requesting a stay of the Commission's cellular resale policy as enunciated in the *Cellular Resale NPRM Order*, only insofar as the Commission clarified the non-discrimination requirement of the policy, pending judicial review.[39]

23. In its Motion for Stay, Cellnet maintained that, contrary to the Commission's clarification in the recent *Cellular Resale NPRM/Order*, in the *Cellular Report and Order* the Commission had established the requirement that the Bell Operating Company (BOC) affiliates maintain separate wholesale and retail divisions and that they offer resale capacity to resellers at wholesale rates.[40] It argued that: (1) it had a chance of prevailing on the merits of its appeal because the Commission's clarification of the resale policy in the *Cellular Resale NPRM/Order* departed from the resale policy established in *Cellular Report and Order*, thus changing the resale rule in violation of the Administrative Procedures Act; (2) it would be irreparably harmed unless a stay was issued because the *Cellular Resale NPRM/Order* would eliminate the wholesale/retail requirements and, as a result, would erode the already poor economic condition of resellers; (3) a stay would not harm resellers and cellular licensees; and (4) the grant of the stay would serve the public interest by preserving competition in cellular markets that occurs from BOC affiliated carriers offering resellers "wholesale" rates.

24. On August 13, 1991, the Bureau released a *Memorandum Opinion and Order* (*Bureau Order*)[41] denying Cellnet's Motion. The Bureau found that Cellnet failed to demonstrate that resellers would suffer irreparable injury if the *Cellular Resale Order NPRM/Order* was not stayed and that granting the Motion would harm the public interest because licensees engaging in discriminatory practices against resellers arguably could continue those practices, in contravention of the clarification in the *Cellular Resale NPRM/Order*. The Bureau concluded, based on the evidence and arguments before it, that Cellnet had failed to meet its burden under *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Jobbers)* and *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1987) (*WMATA)*.

25. In its application for review, Cellnet argues that the *Bureau Order* must be reversed because the Bureau was unauthorized to act upon its Motion for Stay. In this regard, it asserts that Section 0.291 of the Commission's rules, which describes the authority delegated to the Bureau, specifically prohibits the Bureau from issuing orders arising out of a notice of proposed Rule Making. Cellnet claims that the "clarification", which was the subject of its Motion for Stay, was contained in the *Cellular Resale NPRM/Order*. Cellnet also argues that the Bureau failed to address the merits of its Motion for Stay under the four part test required in *Virginia Jobbers*. More specifically, it claims that (1) the Bureau never took into account Cellnet's likelihood of prevailing on the merits because it never addressed the argument that the clarification constituted a rule change in violation of the Administrative Procedure Act; (2) it demonstrated that it would suffer irreparable injury unless the stay was issued; (3) a stay would not harm other parties because the *status quo* would be maintained; and (4) the public would benefit from maintaining the *status quo*. Thus, Cellnet concludes it has satisfied the four part standard of *Virginia Jobbers*.

26. We agree with the Bureau that Cellnet failed to meet its burden under *Virginia Jobbers*.[42] To qualify for a stay, Cellnet must show that (1) it is likely to prevail on the merits; (2) it will be irreparably harmed unless a stay is issued; (3) issuance of the stay will not cause substantial harm to any other party; and (4) the public interest is best served by issuing a stay. *See Virginia Jobbers* and *WMATA*, *supra*. In particular, Cellnet has made no showing of irreparable injury. For these reasons, we deny Cellnet's application for review.

V. CONCLUSION

27. With respect to facilities-based competitors in the cellular industry, we have determined that the policy prohibiting resale restrictions plays an important role in offsetting any competitive advantage that one carrier may have because it was granted a construction permit prior to its competitor. However, once the second carrier's five-year fill-in period has passed, the rationale for prohibiting resale restrictions between facilities-based carriers ceases to exist. The rules adopted herein make a limited exception to the Commission's otherwise unrestricted cellular resale policy and thus allow a licensee to deny resale capacity to its facilities-based competitor in the same market after that competitor's five-year fill-in period has passed. The final Regulatory Flexibility Analysis is contained in Appendix C to this Report and Order.

VI. ORDERING CLAUSES

28. Authority for the changes adopted herein is contained in Sections 1, 4(i) and (j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j) and 303(r).

29. Accordingly, IT IS ORDERED that Part 22 of the Commission's rules IS HEREBY AMENDED as set forth in Appendix B below.

30. IT IS FURTHER ORDERED that the changes made herein WILL BECOME EFFECTIVE thirty (30) days from the date of publication in the Federal Register.

31. IT IS FURTHER ORDERED that the Application for Review filed by Cellnet Communications, Inc. IS DENIED and the Order, 6 FCC Rcd 4827 (Com. Car. Bur. 1991), IS AFFIRMED.

32. IT IS FURTHER ORDERED that this proceeding IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS

1. ALLTEL Mobile Communications, Inc.
2. Amarillo Celltelco
3. Bell Atlantic Mobile Systems, Inc.
4. BellSouth Corporation
5. David M. Block
6. Cellular Telecommunications Industry Association
7. Centel Cellular Company
8. GTE Mobilnet, Inc.
9. McCaw Cellular Communications
10. Michigan Department of Commerce
11. National Telephone Cooperative Association
12. New York Department of Public Service
13. NYNEX Mobile Communications Company
14. PacTel Cellular
15. Don Philpott
16. Southwestern Bell Mobile Systems
17. Telocator
18. United States Department of Justice
19. United States Telephone Association
20. Vanguard Cellular Systems, Inc.
21. John Webb

LIST OF REPLY COMMENTERS

1. Amarillo CellTelco
2. Cellular Marketing, Inc.
3. Cellular Sales Inc.
4. Cellular Telecommunications Industry Association
5. Centel Cellular Company
6. Dobson Cellular Systems
7. Houston Cellular Telephone Company
8. McCaw Cellular Communications
9. NYNEX Mobile Communications
10. PacTel Cellular
11. Southwestern Bell Mobile Systems
12. Telocator

APPENDIX B

AMENDED RULES SECTION

Title 47, Part 22 of the Code of Federal Regulations is amended as follows:

Part 22 - Public Mobile Service

1. The authority citation for Part 22 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066, 1083, as amended: 47 U.S.C. 154, 303.

2. Section 22.914 is amended by revising the section heading, redesignating the existing text as paragraph (b) and adding new paragraph (a) to read as follows:

Section 22.914 Provision of resale capacity and cellular service to subscribers.

(a) A cellular system licensee shall permit unrestricted resale of its service, except that the licensee may apply resale restrictions to the other licensee authorized to provide cellular service in the same market after the five year fill-in period (see § 22.31(f) and 22.31(g)) for the licensee requesting resale has expired. The "same market" as used in this section shall mean the Metropolitan Statistical Area (MSA) or Rural Service Area (RSA) for which the licensee was initially granted a construction permit.

(b) Subscriptions to mobile service shall be afforded to the public within the licensee's Cellular Geographic Service Area in chronological order of filing a request for service, except under emergency conditions. Prospective subscribers shall be informed of the area in which reliable service can be expected. If a licensee turns away a request for service due to lack of capacity it shall report that fact to the Commission and indicate how and when it plans to remedy its lack of capacity.

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

I. Need and purpose of this action:

This Report and Order adopts rules for the provision of resale capacity which encourages facilities-based cellular carriers to build out fully their systems. These rules as necessary to eliminate unnecessary regulations and to ensure maximum competition between the two facilities-based cellular carriers in each market.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were raised in response to the Initial Regulatory Analysis. Several parties suggested modification or clarification to the proposals set forth in the Notice. As a result of these comments, we have adjusted our proposals as appropriate.

III. Significant alternatives considered:

The regulatory burdens we have retained are necessary to carry out our duties under the Communications Act of 1934, as amended. We will continue to examine alternatives in the future with the objective of eliminating unnnecesary regulations and minimizing any significant economic impact on small business entities. A copy of the Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FOOTNOTES

[1] *See* Appendix A for list of commenters. Late-filed pleadings were filed by John Webb and Don Philpott. We will accept these comments in the interest of obtaining a complete record upon which to base our decisions in this proceeding. Ex parte comments were filed by several parties and, in accordance with Section 1.1206 our rules, have been made part of the record in this proceeding.

[2] Reply comments were originally scheduled to be filed on June 4, 1991. On May 28, 1991, in response to a request from Telocator, the deadline for filing reply comments was extended to June 19, 1991. *See Order*, 6 FCC Rcd 3374 (Com. Car. Bur. 1991).

[3] The five year fill-in period is a designated block of time during which the licensee may file applications to serve unserved areas within its Metropolitan Statistical Area (MSA) or Rural Service Area (RSA) but outside the Cellular Geographic Service Area (CGSA). Sections 22.31(a)(1) and (f) of the rules state that applications for unserved areas within the MSA or RSA are not allowed to be filed by anyone except the licensee for a period of five years from the date of grant of the original construction authorization. *See* Rules for Rural Cellular Service (Second Report and Order), 2 FCC Rcd 2306 (1987); Fifth Report and Order, 3 FCC Rcd 6401 (1988).

[4] On May 24, 1991, Cellnet Communications and the National Cellular Resellers Association filed petitions for review in the United States Court of Appeals for the District of Columbia Circuit of the Commission's decision in the *Cellular Resale NPRM/Order*. These parties challenge the non-discrimination requirement of the Commission's cellular resale policy. *Cellnet Communications and National Cellular Resellers Association v. FCC*, D.C. Circuit Nos. 91-1251 and 91-1253, *et al.* This proceeding is pending.

[5] Resale is defined as an "activity wherein one entity subscribes to the communication services and facilities of another entity and then reoffers communications service to the public (with or without adding value) for profit." *See Resale and Shared Use Decision*, 60 FCC 2d at 271.

[6] Section 201(b) of the Act provides that:

> All charges, practices, classifications, and regulations for and in connection with such communication services, shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared unlawful . . . .

[7] Section 202(a) makes it unlawful:

> . . . for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service. . . .

[8] Title III of the Act, 47 U.S.C. Sections 301, *et seq.*, governs the licensing of all communications services which operate through the use of radio frequencies.

[9] 86 FCC 2d at 511.

[10] *See* letter from Deputy Chief, Mobile Services Division (MSD) to Ben C. Fisher, Esquire (April 17, 1988).

[11] In the *Cellular Resale NPRM/Order*, the Commission rejected the request of the National Cellular Resellers Association to conduct a broader inquiry into cellular resale issues. Amarillo CellTelCo and Cellular Marketing, Inc., both of whom have formal complaints pending before the Commission (File Nos. E-91-16 and E-89-273, respectively), have filed comments in this proceeding raising matters other than the issue of not requiring resale to facilities-based competitors. Their comments are thus outside the scope of this proceeding and will be considered in the complaint proceedings.

[12] In the CTC/NYNEX proceeding, the DOJ argued that allowing firms to select their own distribution channels, among other things, promotes interbrand competition. DOJ Response at p.9. Interbrand competition is the competition among manufacturers of the same generic product. In the context of the cellular industry, interbrand competition occurs between the two facilities-based carriers in each market. By contrast, intrabrand competition is the competition among competing distributors of the same brand of product or service.

[13] When the Commission established the wireline frequency set aside and filing requirements, it indicated that there was a possibility that wireline carriers would have an unfair "headstart" over nonwireline carriers in the introduction of cellular service to the public.

[14] *See, e.g.*, McCaw and Lin Comments at 3-4.

[15] Bell Atlantic Comments at 2; Southwestern Bell Comments at 7.

[16] NYNEX Comments at 2 and NYPS Comments at 1.

[17] NYNEX Comments at 3-4.

[18] NYPS Comments at 3-5.

[19] *Id.* at 5.

[20] NYPS Comments at 4.

[21] Michigan PUC Staff Comments at 2.

[22] NYNEX Comments at 8.

[23] DOJ Comments at 5.

[24] NYNEX Comments at 5; NYPS Comments at 5.

[25] We emphasize that we will not hesitate to address on a case-by-case basis any adverse consequences that result from this limited change in our resale policy. For instance, if a carrier could demonstrate that it could not place facilities in an area for environmental or other reasons, the Commission could require competitor resale in that area. *See* note 36, *infra*.

[26] *See e.g.*, DOJ Comments at 6; Bell Atlantic Comments at 3; ALLTEL Comments at 2; Vanguard Comments at 2; and BellSouth Comments at 3.

[27] ALLTEL Comments at 2.

[28] Vanguard Comments at 3.

[29] BellSouth Comments at 4.

[30] PacTel Comments at 10.

[31] GTE Mobilnet/Contel Comments at 5.

[32] Rural Cellular Telephone Coalition Comments at 2.

[33] McCaw/LIN Comments at 5.

[34] Southwestern Bell Comments at 4.

[35] CTIA Reply Comments at 1 n.2.

[36] The five year period should provide carriers with ample time to secure a cell site. However, we agree with Vanguard that there may be certain circumstances when a carrier is unable to secure a cell site for an area served by its competitor. While we will not adopt a rule here requiring a carrier who is unwilling to permit its facilities-based competitor to co-locate on its tower to allow its competitor to resell its cellular service, we will address these matters on a case-by-case basis if they arise in the future.

[37] *See* Section 22.31(a)(1) and (f) of the rules. *See also* Rules for Rural Cellular Service (Second Report and Order), 2 FCC Rcd 2306, 2308-09 (1987).

[38] Given a carrier's natural incentive to serve its own customers and the five year period in which a carrier can effectuate a smooth transfer of its customers to its own system, we do not believe that it is necessary to adopt NYNEX's recommendation to allow a licensee requesting resale to be permitted to continue to serve its customers using its competitor's system on a grandfathered basis. If a carrier relied on the unrestricted resale policy to its detriment, we will entertain requests to grandfather the resale arrangement on a case-by-case basis.

[39] On the same day that it filed its Motion for Stay with the Commission, Cellnet filed a Petition for Review of the Commission's decision in the *Cellular Resale NPRM/Order* with the U.S. Court of Appeals for the District of Columbia Circuit. It challenges the Commission's clarification of the non-discrimination requirement of the cellular resale policy. *Cellnet Communications, Inc. v. FCC*, D.C. Circuit No. 91-1251, *et al.* This proceeding is pending.

[40] In the *Cellular Resale NPRM/Order*, the Commission declined to adopt federally mandated accounting separation rules requiring cellular carriers to operate their resale and wholesale operations for profit, and it declined to require carriers to maintain rate cards for wholesale and retail operations in those states where there are not tariff requirements. The Commission also declined to impose minimum rate-of-return regulations on carrier's wholesale operations. *Cellular Resale NPRM/Order* at 1725-26.

[41] 6 FCC Rcd 4827 (Com. Car. Bur. 1991).

[42] In light of our action on the merits of the stay request, we need not address Cellnet's procedural argument.

Before the
Federal Communications Commission
Washington D. C. 20554

CC Docket No. 90-313
Phase II

In the Matter of

Policies and Rules Concerning
Operator Service Providers

ORDER

Adopted: June 4, 1992; Released: June 5, 1992

By the Chief, Common Carrier Bureau:

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), which is codified as Section 226 of the Communications Act, 47 U.S.C. § 226, directs the Commission to initiate a proceeding to determine whether the regulatory objectives specified in Section 226(d)(1) of the Act are being achieved. Those objectives are to ensure that consumers are protected from unfair and deceptive practices relating to their use of operator services to place interstate long distance calls and to ensure that consumers have the opportunity to make informed choices in making such calls. TOCSIA directs the Commission to submit three reports to Congress on the achievement of these objectives. We have already required all operator service providers (OSPs) to submit periodic reports concerning their rates, complaints concerning their service, and certain costs of providing service in order to gather information for these reports.[1] The Commission's third report to Congress must contain its final findings and conclusions concerning the achievement of the statutory objectives. The Commission must submit this report not later than November 14, 1992.

2. We now direct certain OSPs to provide additional information.[2] These OSPs are the largest carriers in the industry and, although they are not representative of each individual OSP, they can provide valuable data concerning the market for interstate operator service. We therefore direct Americall Systems of Louisville; American Network Exchange, Inc.; AT&T Communications, Inc.; Com Systems, Inc.; International Telecharge, Inc.; MCI Telecommunications Corporation; Telecom*USA;[3] Sprint Communications Company; and United Telephone Long Distance Companies to respond to the questions set forth below.

3. Answers to these questions must be provided for calendar year 1991, and for each calendar quarter of 1992. Information for 1991 and for the period January 1, 1992 through March 31, 1992 shall be filed not later than July 8, 1992. Information for the period April 1, 1992 through June 30, 1992 shall be filed not later than August 17, 1992. Information for the period July 1, 1992 through September 30, 1992 shall be filed not later than November 15, 1992. Finally, information for the period October 1, 1992 through December 31, 1992 shall be filed not later than February 16, 1993. When a question refers to activity by "your customers," it refers only to the use of that service by respondent's customers on its network. The question does not seek the respondent's estimate of the use by its customers of other carriers' services. The questions to be answered are:

(a) The number of calls placed by your customers using proprietary calling cards issued by you.

(b) The number of calls placed on an 0+ basis that did not make use of a proprietary calling card on pay telephones for which you were the presubscribed carrier.

(c) The number of collect calls placed by customers while away from home.[4]

(d) The number of calls placed by your customers using 950 type access. Please specify the proportion of these calls included in the response to question (a).

(e) The number of operator assisted calls placed by your customers using 1-800 type access. Please specify the proportion of these calls included in the response to question (a).

(f) The number of calls placed on your network by customers while away from home using a 10XXX code to reach you.

(g) The number of calls placed on 800 numbers assigned by you to residential customers (*e.g.*, "personal 800" calls).

(h) The number of calls placed on an 800 number issued by you, not including calls included in your response to question (e), which originated from pay telephones or places of public accommodation.

(i) The number of minutes of calling for each of the above categories (a) through (h).

(j) The total revenues received for each type of calling listed in categories (a) through (h).

4. Respondents shall also report on their compliance with the requirement of Section 64.704(d) of the Commis-

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[1] *See* Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Further Notice of Proposed Rulemaking, 6 FCC Rcd 120 (1990) (*FNPRM*); Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, Order, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[2] The Commission delegated to the Chief, Common Carrier Bureau "authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding." *FNPRM*, 6 FCC Rcd at 124.

[3] SouthernNET, Teleconnect and TS Communications all do business as Telecom*USA and file a single informational tariff and monitoring reports.

[4] For the purposes of this report, "away from home" means from a location other than the subscriber's primary place of residence or business.

sion's Rules, 47 C.F.R. § 64.704(d), [5] that they establish an 800 number for provision of operator services. Specifically, for each of the periods listed above, respondents shall state:

(a) The number of calls placed to your 800 number established for the purpose of providing operator service in compliance with the requirements of Section 64.704(d) of the Commission's Rules.

(b) The percentage of calls listed in response to category (a) that are calls placed for the purpose of operator assistance (as opposed to other types of calls, such as billing inquiries or complaints).

(c) The percentage of access code calls represented by the type of calls listed in response to category (a).

(d) The average length of time elapsed between dialing the 800 number established for the purpose of providing operator service in compliance with the requirements of Section 64.704(d) of the Commission's Rules and connection with an operator.

5. In addition, respondents are required to report on their compliance with Sections 226(b)(1)(D) and 226(b)(1)(E) of TOCSIA, 47 U.S.C. §§ 226(b)(1)(D), 226(b)(1)(E). Respondents shall provide the following information:

(a) The number of aggregators for which you are the presubscribed provider of operator services that are in compliance with the provisions of Sections 226(c) and 226(e)(1) of TOCSIA, 47 U.S.C. §§ 226(c), 226(e)(1).

(b) The number of aggregators for which you are the presubscribed provider of operator services that are *not* in compliance with the provisions of Sections 226(c) and 226(e)(1) of TOCSIA, 47 U.S.C. §§ 226(c), 226(e)(1).

(c) What steps you are taking to ensure, by contract, tariff, or otherwise, that the aggregators, for which you are the presubscribed provider of operator services, are in compliance with the provisions of Sections 226(c) and 226(e)(1) of TOCSIA, 47 U.S.C. §§ 226(c), 226(e)(1).

(d) The number of aggregators for which you are the presubscribed provider of operator services and from whom you withhold payment of any compensation, including commissions, because you reasonably believe such aggregators are blocking access by means of 950 or 800 numbers to interstate common carriers in violation of Section 226(c)(1)(B) of TOCSIA, 47 U.S.C. § 226(c)(1)(B), or in violation of rules prescribed by the Commission.

(e) The percentage of aggregators for which you are the presubscribed provider of operator services represented by those aggregators described in response to category (d).

6. Respondents are also directed to provide any studies, analyses, market research reports, or other narrative analysis which addresses the present or prospective volume or revenue of any of the types of calls mentioned in response to the questions set forth above.

7. Responses to these questions shall be filed with the Secretary of the Commission in CC Docket No. 90-313, Phase II, on July 8, 1992 and the subsequent dates indicated above. Respondents shall also file one copy of their responses with the Chief, Common Carrier Bureau, one copy with the Chief, Tariff Division, Common Carrier Bureau, one copy with the Chief, Tariff Review Branch, Tariff Division, Common Carrier Bureau, and one copy with the Chief, Industry Analysis Division, Common Carrier Bureau. These submissions shall be captioned "Response of [name of respondent] to TOCSIA Data Request in CC Docket No. 90-313, Phase II."

8. Respondents may consider some of the information required to be submitted by the Bureau in this Order to be competitively sensitive. If a respondent believes that this information should not be released to the public, it should submit its responses pursuant to Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459.

9. We note that the collection of this information from these nine respondents is not subject to review by the Office of Management and Budget under the Paperwork Reduction Act. *See* 44 U.S.C. 3507 and 5 C.F.R. § 1320.4(a).

10. Accordingly, IT IS ORDERED, that Americall Systems of Louisville; American Network Exchange, Inc.; AT&T Communications, Inc.; Com Systems, Inc.; International Telecharge, Inc.; MCI Telecommunications Corporation; Telecom*USA; Sprint Communications Company; and United Telephone Long Distance Companies SHALL FILE the information requested herein.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[5] *See* Policies and Rules Concerning Operator Service Access and Pay Telephone compensation, Report and Order, CC docket No. 91-35, 6 FCC Rcd 4736 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-91

In the Matter of

Open Network Architecture Tariffs
of Bell Operating Companies

ORDER

Adopted: June 9, 1992; Released: June 9, 1992

By the Chief, Common Carrier Bureau:

1. On January 31, 1992, the Common Carrier Bureau (Bureau) initiated an investigation into open network architecture (ONA) tariffs filed by Bell Operating Companies (BOCs).[1] The BOCs provided cost support material for many ONA services based on the Switching Cost Information System (SCIS), a computer model that quantifies the engineering processes of a switching office in order to apportion switch capacity and cost among the features and functions the switch provides.[2] In a companion Order, the Bureau ordered the BOCs to make available to intervenors in the investigation a version of SCIS with proprietary information redacted from the model and documentation.[3]

2. On June 3, 1992, MCI Telecommunications Corp. (MCI) filed a motion to suspend the due dates for oppositions to the direct cases in the ONA tariff investigation. MCI asserts that the redacted SCIS model originally provided to intervenors was so heavily redacted as to be useless, and the second redacted SCIS model is still being developed.[4] MCI contends that, until the second redacted SCIS model is available, intervenors will be unable to respond to the direct cases in any meaningful manner.[5]

3. We believe that the public interest would be best served by enabling parties to participate fully in the ongoing ONA investigation, without the complication of supplemental pleadings based on review of the second redacted SCIS model. Accordingly, we hereby extend the deadlines previously established in the *ONA Designation Order*.[6] Currently, oppositions to the direct cases filed in that investigation are due to be filed on June 17, 1992. We extend the deadline for filing oppositions to the direct cases to August 17, 1992. Replies to the oppositions are currently due July 2, 1992. We extend the deadline for filing replies to September 15, 1992. Bellcore officials have informally informed us that they expect the second redacted SCIS model to be available no later than the middle of July. Therefore, this schedule should provide intervenors with ample time to examine the second redacted SCIS model prior to filing their oppositions to direct cases.

4. Accordingly, IT IS ORDERED that oppositions to the direct cases in the captioned proceeding SHALL BE FILED not later than August 17, 1992.

5. IT IS FURTHER ORDERED that replies to the oppositions to the direct cases in the captioned proceeding SHALL BE FILED not later than September 15, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] Bell Atlantic Telephone Companies, *et al.*, Open Network Architecture Tariffs, 7 FCC Rcd 1512 (Com.Car.Bur. 1992) (*ONA Investigation Order*). The Bell Operating Companies are the Ameritech Operating Companies, (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company (Southwestern Bell), and US West Communications, Inc. (US West). The Bureau initiated an investigation into Ameritech's ONA tariffs in December 1991. Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Open Network Architecture, Memorandum Opinion and Order, 7 FCC Rcd 257 (Com.Car.Bur. 1991) (*Ameritech ONA Tariff Order*), *modified by* Ameritech Operating Companies, 7 FCC Rcd 948 (Com.Car.Bur. 1992).

[2] US West uses a model that it calls Switching Cost Model (SCM), which US West alleges to be similar to SCIS. Our comments and decisions on SCIS made herein also specifically apply to the US West SCM, unless noted otherwise.

[3] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Com.Car.Bur. 1992) (*SCIS Disclosure Order*).

[4] MCI Motion at 4.

[5] *Id.* at 7-8. Ad Hoc Telecommunications Users Committee (Ad Hoc) filed comments in support of MCI's motion.

[6] Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, 7 FCC Rcd 2604 (Com.Car.Bur. 1992) (*ONA Designation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Contract Tariff F.C.C. No. 9	Contract Tariff Transmittal No. 22

ORDER

Adopted: June 9, 1992; Released: June 10, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On May 28, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective June 11, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 9 for AT&T Custom Software Defined Network International Service, AT&T Global Software Defined Network Service, Accunet Spectrum of Digital Service, and Local Channel Service.

2. On June 4, 1992 MCI Telecommunications Corporation and Sprint Communications Company Limited Partnership filed petitions to reject or, in the alternative, suspend and investigate Contract Tariff Transmittal No. 22.

3. The Common Carrier Bureau has reviewed AT&T Contract Tariff Transmittal No. 22 and the relevant pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or, in the alternative, suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 9, Contract Tariff Transmittal No. 22 filed by MCI Telecommunications Corporation and Sprint Communications Company Limited Partnership ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, FCC 92-181 (released Apr. 17, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policies and Rules for Licensing Fallow 800 MHz Specialized Mobile Radio Spectrum Through a Competitive Bidding Process — RM-7985

ORDER EXTENDING COMMENT PERIOD

Adopted: June 3, 1992; Released: June 9, 1992

By the Chief, Land Mobile & Microwave Division, Private Radio Bureau:

1. On April 22, 1992, Fleet Call submitted a Petition for Rulemaking in this proceeding. The rule making petition was placed on Public Notice on May 11, 1992.[1] The Public Notice established that comments on the Petition are due on June 10, 1992, and reply comments are due on June 25, 1992.

2. Pursuant to Section 1.46(b) of the Rules, the American Mobile Telecommunications Association (AMTA) has requested an extension of time until Friday, July 17, 1992, in which to file comments. In support of its request, AMTA cites the complex nature of the issues involved and the potential impact on the SMR industry of the Fleet Call proposal. AMTA indicates that Fleet Call does not object to the motion for extension of time.

3. Accordingly, IT IS ORDERED, based on the authority in Section 0.331 of the Commission's Rules and Regulations, 47 C.F.R. § 0.331, that the petition for extension of time until **July 17, 1992,** to file comments, and until **August 3, 1992,** in which to file reply comments, requested by AMTA, is granted for all commenters.

FEDERAL COMMUNICATIONS COMMISSION

Edward R. Jacobs, Acting Chief
Land Mobile & Microwave Division
Private Radio Bureau

[1] Public Notice Report No. 1889, May 11, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal No. 2174

Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: May 21, 1992; Released: May 22, 1992

By the Chief, Common Carrier Bureau:

1. On February 25, 1992, Southwestern Bell Telephone Company (SWB) filed Transmittal No. 2174 to provide the state of Missouri with Intelligent Multifunction Multiplexer Service in two of SWB's central offices. Intelligent Multifunction Multiplexing provides both digital and voice multiplexing capability. Transmittal 2174 Description and Justification at 2. The service provides automatic preprogrammed rerouting and customer initiated, or controlled, rerouting of DS1 and DS0 level circuits. *Id.* SWB proposes to price these two services on an individual case basis (ICB). SWB currently provides six other multifunction multiplexers to Missouri at ICB prices. Transmittal 2174 is unopposed. It is scheduled to become effective on May 25, 1992.

2. In its *ICB Order* the Commission stated that DS3 facilities should be offered by local exchange carriers (LECs) at generally available rates.[1] The Order also stated that "carriers that continue to file ICB rates for DS3 service must justify the use of such rates."[2] The Commission reasoned that once a LEC gains sufficient experience with a service to develop averaged rates, it must do so. In the *ICB Reconsideration Order* the Commission stated: "Our conclusion in the *ICB Order* that LECs must justify all departures from general rates is not... limited to DS3s or DS3-equivalents. We accordingly expect that future LEC ICB filings for any service will explain the justification for offering a particular service on an ICB basis."[3]

3. Since the adoption of the *ICB Order* and the *ICB Reconsideration Order*, the Bureau has required a LEC to provide a service at general rates instead of on an ICB basis, once that carrier provides enough facilities to be able to average their costs. It has made no difference that only one customer received the ICB-priced services.[4]

4. This SWB transmittal provides two multifunction multiplexers in Missouri to a single customer, at ICB rates. SWB currently provides six other multifunction multiplexers to the same customer at ICB prices. We believe that SWB's offering this number of facilities in one study area gives it more than enough experience to develop a general, averaged rate for multifunction multiplexer service in Missouri, which rate would be available to all potential multifunction multiplexer customers in that state. Moreover, SWB has made no effort to justify its use of ICB pricing, as required by the *ICB Order* and *ICB Reconsideration Order*. The supporting materials filed with the transmittal contain no assertion that SWB lacks sufficient experience to develop a general rate. Therefore, we conclude that SWB's Transmittal 2174 violates the standard adopted in the *ICB Order* and *ICB Reconsideration Order*. Accordingly, the transmittal is patently unlawful and must be rejected.

5. Therefore, IT IS ORDERED that Southwestern Bell Telephone Company's Tariff F.C.C. No. 68, Transmittal No. 2174 IS REJECTED.

6. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material from its tariff. These revisions shall be scheduled to become effective on one day's notice.

7. IT IS FURTHER ORDERED that Special Permission No. 92-340 IS ASSIGNED and Sections 61.58 and 61.59 of the Commissions Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED for the purposes of issuing the above revisions.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offering, CC Docket No. 88-136, GTE Telephone Operating Companies, CC Docket No. 89-305, 4 FCC Rcd 8634 (1989) (*ICB Order*); *on recon.* 5 FCC Rcd 4842 (1990) (*ICB Reconsideration Order*).

[2] *ICB Order*, 4 FCC Rcd at 8642 (para. 68).

[3] *ICB Reconsideration Order*, 5 FCC Rcd at 4846 (para. 38).

[4] *See* Contel Telephone Companies, 6 FCC Rcd 3468 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 10, 1992

MCI FILES PETITION FOR RULEMAKING TO REQUIRE THAT ALL CELLULAR LICENSEES INTERCONNECT WITH INTEREXCHANGE CARRIERS VIA UNIFORM, NATIONWIDE, CELLULAR EQUAL ACCESS POLICIES AND PROCEDURES, RM-8012

Comments: August 3, 1992
Reply Comments: September 1, 1992

On June 2, 1992, MCI Telecommunications Corporation (MCI) filed a petition for rulemaking seeking a Commission requirement that all cellular licensees interconnect with interexchange carriers (IXCs) via uniform, nationwide, cellular equal access policies and procedures. IXCs provide interstate long distance services.

In particular, MCI explains that residential or business customers in the United States, ordering conventional wireline telephone service, are given the opportunity to presubscribe to a preferred IXC. Further, MCI notes that the Bell Operating Companies (BOCs) afford the same opportunity to customers of their cellular services due to requirements under the Modification of Final Judgment (MFJ) to provide equal access. MCI states that, to its knowledge, no non-BOC cellular licensee affords customers the opportuinity to presubscribe to a preferred IXC. MCI's petition asserts that, given the state of the cellular services market and the varying degree of state regulation of cellular services across the country, it is in the public interest for the Commission to develop uniform, nationwide, equal access policies and procedures to apply to all cellular licensees, including non-BOC cellular licensees.

Interested parties may file comments on or before **August 3, 1992** and reply comments on or before **September 1, 1992** with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. A copy should be sent to Michael Mandigo, Common Carrier Bureau, Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554 and to the Downtown Copy Center, the Commission's contractor for public records duplication, 1114 21st Street, N.W., Suite 140, Washington, D.C. 20037.

For further information contact Michael Mandigo (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning
Rates for Dominant Carriers

MEMORANDUM OPINION AND ORDER

Adopted: May 29, 1992; Released: June 2, 1992

By the Chief, Accounting and Audits Division:

1. On May 17, 1991, the Bureau released its Memorandum Opinion and Order[1] in the above-captioned proceeding to establish in detail the service quality and infrastructure reporting requirements that the Commission had determined were necessary in initiating price cap regulation for local exchange carriers (LECs).[2] The *Service Quality Order* established filing dates for each of the reports required from price cap LECs. Effective March 14, 1991, GTE Service Corporation (GTE) and Contel Corporation (Contel) merged.[3] On March 30, 1992, GTE filed a petition for waiver of some of the filing requirements in the quarterly service quality report for the former Contel companies. In this Order we grant that petition.

2. Table I of the quarterly service quality report, Report 43-05, includes installation and repair data. GTE companies compile data from GTE's Trouble Administration System (TAS) for this report. Prior to Contel's merger with GTE, Contel companies had compiled this information manually; GTE has determined that the data so compiled is highly inaccurate. GTE is now in the process of integrating the telephone companies formerly owned by Contel into GTE's TAS, but that integration is not yet complete. GTE thus seeks a waiver of Table I filing requirements for former Contel companies until completion of the TAS integration, as follows: North Area, June 20, 1992; South Area, July 20, 1992; Central Area, September 14, 1992; and West Area, November 19, 1992. Thus, North Area would file its first complete report September 30, 1992; South Area would file a partial report in September 1992, and complete reports beginning December 1992; Central Area would file its first complete report in March 1993; and West Area would file a partial report in March 1993, and complete reports beginning in June 1993.

3. We find that GTE has narrowly defined its waiver request, and has shown good cause why it should be granted. We therefore grant GTE's request.

4. Accordingly, IT IS ORDERED that the request for waiver filed by GTE Service Corporation in the above-captioned proceeding on March 30, 1992, IS GRANTED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

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[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, 6 FCC Rcd 2974 (Com.Car.Bur. 1991) (*Service Quality Order*).

[2] Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed, D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[3] Contel Corporation and GTE Corporation, File No. ENF-90-11, Memorandum Opinion and Order, 6 FCC Rcd 1003 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-51

In the Matter of

Review of the Commission's
Regulations and Policies
Affecting Investment
in the Broadcast Industry

ORDER

Adopted: May 28, 1992; Released: May 29, 1992

By the Chief, Mass Media Bureau:

1. On May 20, 1992, the National Association of Broadcasters (NAB) filed a Request for Extension of Time for filing comments in response to the *Notice of Proposed Rule Making* in MM Docket No. 92-51, 7 FCC Rcd 2654 (1992) (*Notice*). NAB asks that the Commission extend the time for filing comments until July 2, 1992, and the time for replies until July 24, 1992. Comments and reply comments in this proceeding are presently due on June 12 and July 13, 1992, respectively.

2. NAB requests the extension to enable its Board of Directors to consider the issues raised in the *Notice* at its scheduled meetings of June 23 through June 26, 1992. NAB contends that its Board, which meets twice a year, includes a cross-section of the broadcasting industry. NAB submits that the issues raised in the *Notice* have broad implications for the future of the industry and should be discussed by the full Board.

3. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. Section 1.46, it is our policy that extensions of time not be routinely granted. Moreover, we are particularly interested in expediting consideration of the significant issues in this particular proceeding, given their anticipated impact on the financial condition of the broadcasting industry. NAB has not set forth reasons sufficiently compelling to justify extension of the designated comment and reply periods. We believe that those ample comment periods, which allow 60 days for initial comments and 30 days for reply comments, provide sufficient time for NAB to determine its position on the issues raised in the *Notice*.

4. Accordingly, **IT IS ORDERED** that the Request for Extension of Time filed by the National Association of Broadcasters **IS DENIED.** This action is taken by the Chief, Mass Media Bureau, under authority delegated by Section 0.283 of the Commission's Rules, 47 C.F.R. Section 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IT&E Overseas, Inc. and
PCI Communications, Inc.

Petition for Emergency Relief
and Expedited Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted: May 29, 1992; Released: June 2, 1992

By the Commission:

I. INTRODUCTION

1. In response to a petition by IT&E Overseas, Inc. (IT&E),[1] we conclude that the Guam Telephone Authority (GTA) has violated sections 201 and 202 of the Communications Act and direct GTA to show cause why it should not file lawful exchange access tariffs with this Commission.[2] We also conclude that the Territory of Guam and the Guam Telephone Authority are subject to the Communications Act of 1934 (the Act), and that the Federal Communications Commission has exclusive jurisdiction over interstate and foreign common carrier communications that originate or terminate on the Territory of Guam.

II. BACKGROUND

2. In 1898 Spain ceded the Territory of Guam to the United States.[3] Until 1950, Guam was lawfully governed, and telephone service provided, by the U.S. Navy.[4] In 1950, Congress adopted the Organic Act which authorized civilian governance of those portions of Guam that were not reserved to the Navy.[5] The Organic Act permitted Guamanians to elect a legislature that could enact laws that were not inconsistent with laws of the United States applicable to Guam. In 1953, the Navy transferred responsibility for civilian telephone service to the Public Utility Agency of Guam[6] and, in 1973, the government of Guam created GTA as a separate, not-for-profit "public corporation and autonomous instrumentality"[7] to provide civilian telephone service.[8] Long distance telephone service was provided exclusively by RCA Global Communications, Inc. (Globcom)[9] until 1985, when IT&E began offering interstate common carrier communications services in competition with Globcom.

III. THE PLEADINGS

3. In its petition, IT&E states that the Territory of Guam and GTA are subject to the Communications Act; and that GTA charged unreasonable prices, and engaged in unreasonably discriminatory practices, that favored Globcom, disadvantaged IT&E, and violated the Communications Act. In response, GTA argues that Guam Public Law 20-146, adopted in 1990 and purporting to confer jurisdiction on the Guam Public Utilities Commission over interstate and foreign common carrier communications, originating or terminating on Guam, displaces the Communications Act. GTA contends that this displacement is legitimate because Congress reserved to itself the power to invalidate acts of the Guam Legislature. GTA further argues that it is a "federal instrumentality" that is not a "person" within the meaning of Sections 2(a) and 3(i) of the Communications Act and, as such, is not subject to the Act.

IV. DISCUSSION

4. We first conclude that the Communications Act extends to the Territory of Guam, and reject arguments that GTA is not subject to the Communications Act. We then consider evidence of record and conclude that GTA has violated the Communications Act. We order GTA to show cause why it should not be required to file lawful access tariffs with this Commission. In order to avoid further exacerbation of the situation, we also require GTA to perform certain acts, and to refrain from performing other acts, affecting interstate and foreign common carrier communications during the pendency of this proceeding.

A. Jurisdiction

5. Congress has plenary authority to enact legislation concerning Guam, and all authority that may be exercised by the Government of Guam is determined by Congress.[10] In 1934, Congress adopted the Communications Act,

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[1] IT&E Petition for Emergency Relief and Expedited Declaratory Ruling (July 9, 1990)(Petition).

[2] During April 1992, the Common Carrier Bureau granted co-petitioner status to PCI Communications, Inc. *See* Petition of IT&E Overseas, Inc. Concerning the Guam Telephone Authority and Guam Public Law 20-146, Order, DA 92-491 (released Apr. 28, 1992). In this order, we grant IT&E's motion of Nov. 16, 1990 to file corrected reply comments, and grant IT&E's motion of Nov. 27, 1990 to file an exhibit to IT&E's corrected reply (Nov. 19, 1990). On July 17, 1990, IT&E filed an informal complaint against GTA. We consolidate the record compiled in that proceeding (IC 90-05779) with the record of this proceeding. *See* 47 U.S.C. § 154(i)-(j). We deny the requests of RCA Global Communications, Inc. and IT&E for confidential treatment since disclosure is in the public interest.

[3] 30 Stat. 1754, Art. II (Dec. 10, 1898).

[4] Executive Order No. 108-A (Dec. 23, 1898).*See, generally,* Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* (1989) at 318-25.

[5] Act of Aug. 1, 1950, ch. 12, 64 Stat. 384 (codified at 48 U.S.C. §§ 1421-28 (1988))("Organic Act").

[6] GTA Opposition at 5-6, citing Guam Pub. L. 1-88 (1952).

[7] Guam Telephone Authority Act, 12 Guam Code Ann. § 7103 (1973). *See* GTA Opposition at 6.

[8] GTA Opposition at 6-7, Appendix A at 2. *See also* GTA Opposition at 6, n.11, 47 U.S.C. § 153(r).

[9] After MCI's acquisition of Globcom, Globcom's common carrier operations and assets were transferred to Western Union International (WUI), a subsidiary of MCI. WUI operates on Guam using the "RCA Global Communications" name. MCI Comments (Oct. 15, 1990) at n. 2.

[10] Treaty of Paris, 30 Stat. 1754, Art. IX. U.S. Constitution Art. VI, Section 2; Art. IV, Section 3; Art. 1, Section 8; Art. 2,

which created the Federal Communications Commission (Commission) to regulate "interstate and foreign commerce in communication by wire and radio."[11] The Act defined "interstate communication" to include the communication or transmission "from any State, Territory, or possession of the United States" to "any other State, Territory, or possession of the United States."[12] Congress also defined the "United States" to include the states, territories, and possessions of the United States,[13] and stated that "foreign communication" meant "communication or transmission from or to any place in the United States to or from a foreign country."[14] From these sections, it is clear that the Communications Act was intended by Congress to apply, and applies, in every respect, to all radio and wire communications originating or terminating on the Territory of Guam, and that Congress gave exclusive jurisdiction over all interstate and foreign common carrier communications, originating or terminating on Guam, to this Commission.[15]

6. GTA contends, however, that Congress did not intend to prevent the government of Guam from asserting jurisdiction over interstate and foreign common carrier communications because the Organic Act reserved to Congress the right to annul acts of the Guam Legislature and Congress has not annulled Guam Public Law 20-146.[16] The contention is without merit. The Organic Act states that the legislative power of Guam extends only to "subjects of legislation of local application *not inconsistent with* the provisions of this chapter and *the laws of the United States applicable to Guam.*"[17] As previously discussed, Guam was subject to the Communications Act of 1934 when the Organic Act was passed in 1950 and it still is. Guam's legislature does not have any jurisdiction over interstate common carrier communications to or from the Territory of Guam.

7. As stated above, the jurisdictional issue is clear on its face. For the sake of completeness, however, we now address the specific arguments raised by GTA in an attempt to exclude itself from the Federal Communications Commission's jurisdiction. For example, GTA further contends that it is not subject to the Communications Act because, as a "federal instrumentality," GTA is not a "person" under Sections 2 and 3 of the Act that is subject to the Communications Act.[18] However, GTA concedes that it is Congress' intent that ultimately controls the issue.[19]

8. GTA is incorrect in its assumption that because the government of Guam is a federal instrumentality for some purposes, that GTA is a federal instrumentality that is not subject to the Communications Act. While the government of Guam has been viewed as a federal instrumentality under federal antitrust laws[20] and civil rights legislation (42 U.S.C. § 1983), it may not be viewed as a federal instrumentality for all purposes. [21] Whether the government of Guam is a federal instrumentality under a particular statute depends on the statute in question.[22] As discussed, the sole factor that decides the. issue of FCC jurisdiction over GTA is the Communications Act. GTA has not adduced any evidence to support its assertion that the government of Guam should be treated as a federal instrumentality under the Communications Act. Moreover, even if the government of Guam were considered a federal instrumentality for purposes of the Communications Act,

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Section 2, clauses 1 and 2. *Late Corporation of Church Of Jesus Christ of Latter-Day Saints,* 136 U.S. 1, 42-43 (1890); *De Lima v. Bidwell,* 182 U.S. 1, 39 (1901).

11 47 U.S.C. § 151. *See also* 47 U.S.C. §§ 153(a)-(b), (d).

12 47 U.S.C. § 153(e).

13 47 U.S.C. § 153(g).

14 47 U.S.C. § 153(f).

15 1 U.S.C. § 1; 47 U.S.C. §§ 151-153, 201, 205, 301, 501-504. Interstate communications are "totally entrusted to the FCC." *National Ass'n of Regulatory Util. Comm'rs v. FCC,* 746 F.2d 1492, 1498 (D.C. Cir. 1984). *Western Union Telegraph Co. V. FCC,* 665 F.2d 1126, 1150 (D.C. Cir. 1981)("Guam and Hawaii are under the FCC's jurisdiction...") .*See, e.g., Telerent Leasing Corp. et al.,* 45 FCC 2d 204, 217 (1974), *aff'd sub nom. North Carolina Utilities Commission v. FCC,* 537 F.2d 787 (4th Cir.), *cert. denied,* 429 U.S. 1027 (1976); *Vaigneur v. Western Union Telegraph Co.,* 34 F. Supp. 92, 93 (E.D. Tenn. 1940); *AT&T Communications v. Public Service Comm'n,* 625 F. Supp. 1204, 1208 (D. Wyo. 1985). *See also* IT&E Petition at 21-24 and references cited therein. This interpretation is consistent with more than four decades of Commission precedent concerning Guam. *See,e.g.,* Allocation of Frequencies, 39 FCC 393, 401 (1949); Fourth Report and Order UHF Television Expansion, 41 FCC 1083, 1110 (1965); Competitive Carrier Second Report and Order, 93 FCC 2d 54, 61-62 (1980).

16 GTA Opposition at 10-13.

17 48 U.S.C. § 1423(a)(emphasis supplied). At the time that the Organic Act was adopted, the Communications Act was being applied to Guam. Report of the Commission on the Application of Federal Laws to Guam (P.L. 630, 81st Cong., 2d Session), 82d Congress, 1st Session, House Document No. 212 (July 31, 1951) at 1; Resource Material Used In The Preparation Of The Report Of The Commission On Application Of Federal Laws To Guam," U.S. Govt. Printing Office #93120 (Wash., D.C. 1952), Memorandum at 3-4, 15-16; Allocation of Frequencies, 39 FCC 393, 401 (1949). It should also be noted that Guam Public Law 20-146 is not a "subject of legislation of local application" that would be a proper area for Guamanian legislation, since it purports to regulate charges, terms, and conditions of interstate and foreign communications.

18 GTA Opposition at 13-16.

19 *Id.* at 11-16, 18-19.

20 *E.g., Sakamoto v. Duty Free Shoppers, Ltd.,* 764 F.2d 1285 (9th Cir. 1985).

21 *See Blas v. Gov't. of Guam,* 941 F.2d 778, 779 (9th Cir. 1991), *cert. denied,* 60 U.S.L.W. 3545 (U.S. Mar. 9, 1992) ("This court has not previously decided whether Guam is a federal agency for purposes of Rule 4(a)(1)[of the Federal Rules of Appellate Procedure]. We have recognized that Guam should be viewed as a federal instrumentality for some purposes.... Nevertheless the court has also recognized that the designation of an organization as a federal instrumentality is not dispositive as to whether the organization is a federal agency for purposes of Rule 4(a)(1)").

22 *Compare Ngiraingas v. Sanchez,* 110 S.Ct. 1737 (1990) (Brennan and Marshall, J.J., dissenting) (held that Guam is a federal instrumentality for the purposes of 42 U.S.C. § 1983) *with Blas v. Government of Guam,* 941 F.2d 778 (9th Cir. 1991), *cert. denied,* 60 U.S.L.W. 3545 (U.S. Mar. 9, 1992) (held that Guam is not a federal instrumentality under Rule 4(a)(1) of the Federal Rules of Appellate Procedure). In *Ngiraingas,* the Supreme Court held that Guam is a federal instrumentality and not a "person" under 42 U.S.C. § 1983. In its decision, the Supreme Court concluded that Congress did not intend to include Guam within the meaning of the term "person" in § 1983. The Court looked first to the statute as originally passed, and as amended, and then to legislative history. The term "person" was not defined by the statute in question, but had been amended simultaneously in the Dictionary Act to include only partnerships and corporations. Guam itself, of course, is not a corporation. Here, as discussed below, GTA is a corporation, and is a person within the definition in the Communications Act.

GTA has established itself as a corporation separate from the government of Guam to comply with Rural Electrification Administration (REA) financing requirements.[23]

9. To determine if GTA is a "person" within the meaning of Sections 2 and 3 of the Communications Act, and therefore subject to the jurisdiction of the Federal Communications Commission, we look to the statutory scheme and to the language of Sections 2 and 3 of the Communications Act. Section 2, which establishes the jurisdiction of the Commission, states that "[t]he provisions of this chapter shall apply to all interstate and foreign communication... which originates and/or is received within the United States."[24] The Act defines "United States" as "the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone."[25] The Act applies to all "persons" engaged within the United States in interstate and foreign communication by wire or the interstate and foreign transmission of energy by radio."[26] The term "person" includes "corporation,"[27] and the term "corporation" includes *"any* corporation."[28]

10. Surely the plain and natural meaning of "any corporation" is just that -- any corporation -- and must, perforce, include any corporation, including public corporations, on Guam. In this regard, it is undisputed that GTA is in fact a corporation.[29] This reading of Sections 2 and 3 is borne out by the carefully crafted exceptions to the Commission's authority contained in Section 2(a) of the Act.[30] In the original Act, Congress crafted exceptions for both the Philippine Islands and the Canal Zone.[31] If Congress had not wanted the Commission to have jurisdiction over interstate communications to and from Guam and over public corporations owned by Guam, Congress would have crafted express limitation or exclusion of Commission authority as it did, *e.g.,* for the Canal Zone. Yet, Congress did not distinguish Guam in any way, and did not create an exception for public corporations engaged in interstate and foreign communications.

11. Moreover, Commission jurisdiction over GTA is in keeping with the overall purposes of the Act as expressed in Section 1. Section 1 expressly states that one of the purposes for the creation of the Federal Communications Commission was to *centralize* authority over *interstate and foreign* communications in one federal agency. If the Guam PUC were to have jurisdiction over the interstate and foreign communications of Guam, then two bodies, the Commission and the PUC, would share authority over interstate and foreign communications in the United States.

12. In sum, it is clear from the language of the statute and the statutory scheme that Congress intended that the Federal Communications Commission exercise jurisdiction over Guam and GTA's interstate and foreign common carrier communications. As a consequence, the Guam Legislature is without authority to enact legislation regulating interstate or foreign common carrier communications and the Guam Public Utility Commission did not, and does not, have the authority to issue any order, or to conduct any regulatory investigation, concerning matters that are within this Commission's exclusive jurisdiction.

B. Violations of the Communications Act By GTA

13. The record in this proceeding is filled with allegations of unjust, unreasonable, and unreasonably discriminatory acts by GTA, many of which are uncontested.[32] We have reviewed the record carefully and conclude that it establishes a pattern and practice of unjust and unreasonable behavior on the part of GTA, in violation of the Communications Act. The initial violations apparently arose from a compact between GTA[33] and Globcom to retard the rate at which interexchange competition could develop on Guam.[34] GTA achieved this objective through

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[23] *See* IT&E Reply, Ex. 9 (Letter from R. Peters, Director, Western Area of the REA, to J. L. Perez, President of GTA (May 20, 1980); Letter from R. Peters to J. T. San Agustin, Manager of GTA (May 20, 1980); Deposition of R. Peters (Apr. 13, 1989) at 43 and 192). As Mr. Peters points out, if GTA were part of the Government of Guam, it would not qualify for REA loans. *Id. See generally* 7 U.S.C. §§ 922, 913; IT&E Reply at 39-40.

[24] 47 U.S.C. § 152(a).

[25] 47 U.S.C. § 153(g).

[26] The Act also applies to all interstate and foreign communications by wire or radio and to all interstate and foreign transmission of energy by radio which originates and/or is received in the United States. 47 U.S.C. § 152(a).

[27] 47 U.S.C. § 153(i).

[28] 47 U.S.C. § 153(j) (emphasis supplied).

[29] *See* GTA Opposition at 6 (citing Guam Telephone Authority Act, 12 Guam Code Ann. § 7103).

[30] In 47 U.S.C. § 152(a), Congress drafted a comprehensive exclusion of Commission authority for the Canal Zone. The section states, "The provisions of this chapter... shall not apply to persons engaged in wire or radio communications or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone...."

[31] Communications Act of 1934 Conference Report, No. 1918, H.R. 73d Congress, 2d Session, Statement of the Managers on the Part of the House at 45.

[32] GTA does not contest factual allegations contained in the petition and IT&E's informal complaint. *See* GTA Opposition, n.13 (statement that GTA "will rely upon the Commission's judgment and experience to separate wheat from chaff"); IT&E Informal Complaint (dated July 17, 1990); Letter from K. Kneff, Chief - FCC Informal Complaints and Public Inquiries Branch to GTA, dated Aug. 7, 1990 (letter requesting that GTA respond to IT&E's complaint); Letter from V. Ahern, Counsel for GTA, to K. Kneff, Chief - FCC Informal Complaints and Public Inquiries Branch, dated Sept. 6, 1990 (letter declining to answer the allegations contained in the complaint); Letter from V. Toth, Counsel for IT&E, to M. Hess, Chief, FCC Enforcement Division (dated Oct. 10, 1990)(letter concluding that GTA's letter declining to respond to IT&E's complaint was an admission of guilt that should be treated as a plea of *nolo contendere).*

[33] The initial impetus appears to have resulted from a desire by GTA to receive an increasingly large share of toll revenues from Globcom. *See* IT&E Petition, Ex. 2 (Jan. 12, 1984 memo to V. Podmolik) at 5, Ex. 6. *See also* IT&E Reply, Ex. R2-B (Globcom did not want GTA to file an access tariff with the FCC because an access tariff would stimulate competition and facilitate entry by other interexchange carriers). GTA's desire for additional revenues eventually extended to IT&E. *See id.* at Ex. 6-7.

[34] *E.g.,* MCI Comments, Ex. 5 at 2-9, Ex. 6. IT&E Petition, Ex. 27, Letter from D.B. Cohen to L. Sevier (Jan. 24, 1983)(concerning proposed amendments to the GTA/Globcom traffic agreement to protect Globcom from competition); Ex. 26, Affidavit of R. F. Kelley, Jr. (concerning GTA's provision of inferior access to Globcom's competitors); Ex. 25, Affidavit of R. H. Kalbrener (refusal of GTA to provide access to a potential competitor of

a variety of unjust and unreasonable practices. GTA deterred entry by those seeking to compete with Globcom by refusing to provide access services, and by using a nonstandard network interface.[35] GTA provided inferior access services to IT&E, including unannounced service disconnections, unsatisfactory response times to serious service outages, and not disconnecting customers who did not pay toll charges.[36] While providing IT&E with inferior access, GTA insisted IT&E sign an agreement that would force IT&E to pay increasingly larger amounts, well in excess of any reasonable measure of cost, for the grade of access that IT&E received.[37] GTA threatened IT&E with disconnection[38] until IT&E paid 50% of its revenues to GTA'"[39] under a division of revenue contract that was unreasonably discriminatory in effect.[40] Based upon this record, we conclude that GTA's interconnection practices, charges, and settlement agreements were, and are, unjust, unreasonable, and unreasonably discriminatory in violation of Sections 201 and 202 of the Communications Act.[41]

V. CONCLUSION

14. We conclude that the Guam Legislature was without authority to enact legislation concerning, or affecting, interstate or foreign common carrier communications. As a consequence, all actions that were taken pursuant to the authority contained in Section 6 of Guam Public Law 20-146 were, and are, unenforceable.

15. Accordingly, we order GTA to show cause why GTA should not be required to file lawful interstate and foreign exchange access service tariffs with this Commission. We believe that the residents of Guam are just as entitled to the benefits of competition in telecommunications as any other Americans. Accordingly, we also require GTA to show cause why, if GTA were to fail to file lawful tariffs, this Commission should not prescribe tariffs for GTA's interstate and foreign exchange access services. In requiring GTA to make each showing, we direct GTA to present all arguments and provide all documentation that is relevant to each issue.

16. In addition, after having examined the nature of the violations of the Act committed by GTA, we also direct GTA, during the pendency of this proceeding, to refrain from causing additional harm to long distance carriers serving Guam. We take this unusual measure, on an interim basis, because of an urgent need to prevent the unjust and unreasonable practices and settlement agreements of the Guam Telephone Authority. As the record indicates those practices have put some companies at a serious disadvantage, and it is possible that GTA's actions may put one, or more, interexchange carriers out of business.[42] Accordingly, we require GTA to meet each of the following specific requirements during the pendency of this proceeding: (1) GTA shall not disconnect, or otherwise impair or degrade service, to any interstate or foreign interexchange common carrier; (2) GTA shall not alter the grade of service received by any interstate or foreign interexchange common carrier in the absence of a duly acknowledged, written request therefor; (3) GTA shall continue, on behalf of interconnected interstate and foreign interexchange carriers, to bill, collect, and remit charges for interstate and foreign common carrier communication services; (4) GTA shall continue to provide billing information to interconnected interstate and foreign interexchange carriers; (5) GTA shall provide interconnection and other exchange access services to interexchange

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Globcom). IT&E Reply, Ex. 2 (correspondence concerning advantages given to Globcom by GTA that would not be available to IT&E; Telex stating that GTA will not offer equal access services to Long Distance U.S.A.; memo stating that Globcom will continue to be the only long distance carrier listed in GTA's pink pages directory); Ex. 7, Attachment 4 (GTA memo stating that it will protect "the continued viability of [Globcom's] total business operation in Guam"); Ex. R2 S (Globcom memo stating that it would receive "Most Favored Nations" treatment from GTA if another carrier enters the toll market, and that Globcom would receive "'first choice' in the event access arrangements are changed"); Ex. R2 T (memo documenting GTA provision of information to Globcom concerning a potential competitor of Globcom).

[35] *E.g.*, Petition, Ex. 25 (affidavit describing GTA's refusal to provide access services in 1984 and 1985 to a potential Globcom competitor, and GTA's choice of a nonstandard interface for its stored-program-control switch that inhibited competitive entry).

[36] *See* IT&E Complaint at 2-5; IT&E Petition at 10-13 and references cited therein, Ex. 13-14, 25-26.

[37] IT&E Petition at 3-5, Ex. 1, 14. IT&E Complaint at 3-7 and Ex. 1. For an illustration of how, for inferior access, IT&E would be required to pay 4.5 times the access rate charged Globcom *see* IT&E Reply at 14-18, Ex. 5; Petition at Ex. 7.

[38] *E.g.*, IT&E Petition at 13-17, Ex. 17; IT&E Reply at n.18; GTA Opposition at 34.

[39] IT&E Petition at 6-7, 25-28, Ex. 7. The 50% charge was substantially in excess of a reasonable charge for providing access to IT&E. As stated by the Guam Public Utility Commission: "GTA's historic access charge [50% of net revenues] has produced enormous revenues to GTA.... [A]dditional adjustments to the level of access payments will be necessary to avoid the transfer of payments from carriers well in excess of GTA's legitimate requirements." Guam Public Utilities Commission Decision in Docket Nos. 90-001 and 90-003 (Mar. 5, 1992) at 2. *See* Study and Workpapers transmitted by P. Verveer to K. Nilsson (Jan. 6, 1992), *passim*. *See also* IT&E Reply at 1922. GTA also threatened IT&E by stating that it would withhold data base updates and not list IT&E dialing instructions in its local directory. IT&E Petition, Ex. 15.

[40] For an illustration of the unjust and unreasonable charges in the GTA agreements, *see* IT&E Reply at 19-22; IT&E Petition, Ex. 7 at 2-3. *See also* IT&E Reply at nn. 19, 25. MCI also complained that GTA's charges for interstate access services were unreasonably discriminatory. Petition at Ex. 7, Letter from J. Worthington to J. Manibusan, dated Oct. 31, 1989. *See also* IT&E Petition at 6, IT&E Reply at Ex. 5. IT&E Petition (July 9, 1990) at 9-11, Ex. 7. Apparently the terms of the coerced agreements were not identical. *Id.*, Ex. 16 at 2. It is clear that the amount paid per minute, or per line, for access was not identical. Petition, Ex. 14, Letter from J. Borlas to J. Santos, Jr. (Oct. 25, 1988) at 3-4.

[41] *See generally* IT&E Petition at Ex. 13, Declaration of J. Borlas (describing inferior access provided by GTA, destruction of IT&E billing data by GTA, coercion by GTA to force IT&E to enter into a 50/50 traffic agreement); Ex. 12, Letter from J. Borlas to J. Manibusan (describing inferior services received by IT&E from GTA while paying a much higher rate than was being paid by Globcom).

[42] *E.g.*, Letter from E. Fishman, Counsel for PCI Communications, Inc., to D. R. Searcy, Secretary, Federal Communications Commission (May 6, 1992) at 3-5 (letter stating that on June 1, 1992, PCI will be subject to a more than thirty-fold, "catastrophic," increase in GTA access service charges). *See generally* 47 U.S.C. §§ 1, 4(i)-(j), 201, 202, 205.

carriers in accordance with reasonable requests therefor; (6) GTA shall not increase any charge for any interstate or foreign exchange access service without prior FCC approval. These actions are taken pursuant to the authority contained in Sections 1-3, 4(i)-(j), 5(c), 201, 202, 205, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-153, 154(i)-(j), 155(c), 201, 202, 205, and 403.

VI. ORDERING CLAUSES

17. ACCORDINGLY, WE DECLARE that the Federal Communications Commission HAS EXCLUSIVE JURISDICTION over interstate and foreign common carrier communications originating or terminating on Guam.

18. WE FURTHER DECLARE that Section 6 of Guam Public Law No. 20-146 IS, in its entirety, INCONSISTENT with the Communications Act of 1934, as Amended.

19. WE FURTHER DECLARE that all acts of the Guam Public Utility Commission, its agents, and the Guam Telephone Authority that were taken pursuant to the authority contained in Section 6 of Guam Public Law No. 20-146 WERE, AND ARE, INCONSISTENT WITH THE EXCLUSIVE JURISDICTION OF THE FEDERAL COMMUNICATIONS COMMISSION and the Communications Act of 1934, as Amended.

20. IT IS ORDERED that not later than July 10, 1992, the Guam Telephone Authority SHALL SHOW CAUSE:

(i) why it should not file interstate and foreign exchange access tariffs that comply with sections 201 and 202 of the Act by January 1, 1993;

(ii) if it does not file lawful interstate and foreign exchange access tariffs by January 1, 1993, why this Commission should not prescribe interstate and foreign exchange access tariffs for the Guam Telephone Authority;

(iii) why the Guam Telephone Authority should not be required to designate an agent for service of process in the District of Columbia as required by section 413 of the Act.

21. DURING THE PENDENCY OF THIS PROCEEDING AND UNTIL FURTHER ORDER OF THIS COMMISSION, IT IS ORDERED that the Guam Telephone Authority:

(i) SHALL NOT DISCONNECT, OR OTHERWISE IMPAIR OR DEGRADE SERVICE, to any interstate or foreign interexchange common carrier;

(ii) SHALL NOT ALTER the grade of service received by any interstate or foreign interexchange common carrier in the absence of a duly acknowledged, written request therefor;

(iii) SHALL NOT INCREASE any charge for any interstate or foreign exchange access service without prior FCC approval.

22. IT IS FURTHER ORDERED that the Guam Telephone Authority SHALL:

(i) provide interconnection and other exchange access services to interexchange carriers in accordance with reasonable requests therefor;

(ii) continue, on behalf of interconnected interstate and foreign interexchange carriers, to bill, collect, and remit charges for interstate and foreign common carrier communication services;

(iii) continue to provide billing information to interconnected interstate and foreign interexchange carriers;

(iv) serve copies of its responses to the requirements contained in this Memorandum Opinion and Order upon all parties to this proceeding;

(v) file seven copies of its responses to the requirements contained in this Memorandum Opinion and Order with the Secretary of the Federal Communications Commission.

23. IT IS FURTHER ORDERED that the Secretary SHALL SERVE a copy of this order upon Veronica Ahern, Counsel for the Guam Telephone Authority, Suite 800, One Thomas Circle, N.W., Washington, D.C. 20005 and upon each party to this proceeding.

24. IT IS FURTHER ORDERED that interested parties may file comments by July 31, 1992.

25. IT IS FURTHER ORDERED that for *ex parte* purposes, this is a non-restricted proceeding that is subject to the requirements of Section 1.1206(a) of the Commission's rules, 47 C.F.R. § 1.1206(a).

26. IT IS FURTHER ORDERED that the Motion of the Guam Telephone Authority to dismiss IT&E's Petition IS DENIED.

27. IT IS FURTHER ORDERED THAT this Memorandum Opinion and Order IS EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-34

In the Matter of

Bundling of Cellular Customer
Premises Equipment and
Cellular Service

REPORT AND ORDER

Adopted: May 14, 1992; Released: June 10, 1992

By the Commission: Commissioner Duggan concurring in part and dissenting in part and issuing a statement.

I. INTRODUCTION

1. On March 27, 1991, we released a Notice of Proposed Rule Making (Notice)[1] seeking comments on whether we should clarify our policy governing bundling of cellular customer premises equipment (CPE) and cellular service. In particular, we sought comments on whether, or on what conditions, we should allow cellular CPE and cellular service to be offered on a bundled basis, provided that service is also offered separately at a nondiscriminatory price. Numerous parties filed comments[2] and reply comments[3] in response to our Notice.[4] Based on our careful analysis of all the comments and issues,[5] we are clarifying and modifying our policy to allow cellular CPE and and cellular service to be offered on a bundled basis, provided that cellular service is also offered separately on a nondiscriminatory basis. Our decision is based on the unique conditions in the cellular market today and on the public interest benefits associated with bundling in that market.

II. BACKGROUND

2. In the *Second Computer Inquiry* proceeding, the Commission required that common carriers sell or lease CPE separate and apart from the carrier's regulated services, and that new CPE be untariffed.[6] By requiring common carriers to offer unbundled CPE and transmission services, the Commission wanted to assure that customers have the ability to choose their own CPE and service packages to meet their communication needs[7] and that they not be forced to buy unwanted carrier-supplied CPE in order to obtain necessary transmission service. The Commission was also concerned that consumers who do not use carrier-provided CPE might find themselves subsidizing consumers who do use carrier-provided equipment,[8] and that independent CPE vendors might be forced to compete against below-cost, tariffed CPE because part of the CPE costs would be recovered through regulated tariffed service rates.

3. Subsequently, in authorizing commercial cellular service for the first time in 1981, the Commission stated:

> Under our *Second Computer Inquiry*, new terminal equipment is to be deregulated (i.e., unbundled and detariffed) after March [1], 1982. Because cellular service is a new service for which its mobile equipment has never been tariffed, we will require that it be unbundled and detariffed (untariffed) from the start.[9]

The Commission further indicated in *Cellular CPE*, 57 RR 2d 989, 990 (1990), that the provision of cellular CPE should be left largely to the marketplace, on a competitive, unregulated basis.

4. On December 23, 1988, the National Cellular Resellers Association (NCRA) filed a petition for declaratory ruling requesting that the Commission institute a proceeding to declare that certain practices on the part of facilities-based cellular carriers violate the unbundling policy, citing *ITT World Communications, Inc. v. TRT Telecommunications Corp.*, 51 RR 2d 1386 (1982) (*ITT World*).[10] NCRA alleged that the carriers' bundling practices were anticompetitive and unlawful. Cellular carriers and the cellular industry trade associations opposed NCRA's petition, asserting that the allegations of anticompetitive practices were unsubstantiated. In their view, marketing packaged deals is not prohibited bundling because CPE and service are also available separately and cellular service is priced identically to the packaged cellular service.

5. On March 27, 1991, we instituted this Rule Making proceeding to develop a complete record on the status of the bundling policy in the current cellular marketplace. As part of this proceeding, we indicated that NCRA's petition and the comments that were filed in response to NCRA's petition were to be made a part of the record.[11] We also indicated that this proceeding was being initiated to determine whether the cellular bundling policy should be eliminated, modified or clarified.[12]

III. DISCUSSION

6. Our Notice indicated that it was appropriate to reevaluate our bundling policy in light of changes that have occurred in the cellular industry. We indicated generally that bundling might present no problems as long as the markets for the components of the bundle are competitive. Thus, we proposed to look at the competitiveness of the cellular CPE market and the competitiveness of the cellular service market. In view of the Commission's concern that customers have the ability to choose their own CPE and service packages to meet their own communication needs and that they not be forced to buy unwanted carrier-provided CPE in order to obtain necessary service, we also asked whether consumers would be harmed by permitting bundling. In addition, we sought comment on the public interest benefits of permitting bundling.[13] Finally, we tentatively concluded that the current lack of regulation of the cellular industry reflects the competitiveness of the industry, and we asked for comments on the status of federal and state regulation of cellular service.

7. We have analyzed the record before us in light of the public interest objectives underlying the Commission's cellular bundling policy. This record shows that while the cellular CPE market is competitive, the cellular service is not fully competitive, thus leaving open the possibility that bundling may be used for anticompetitive purposes. Nevertheless, we do not believe that the potential for carriers

to engage in anticompetitive conduct provides a basis to prohibit bundling *per se*. Despite some concerns raised about the status of competition in the cellular service market, the record supports the conclusion that modifying the bundling policy is in the public interest because the public interest benefits of bundling in the cellular market outweigh the potential for competititve harm. *See* paras. 19-21, *infra*. These benefits include the provision of discounted CPE to customers who otherwise would not subscribe to cellular service and the promotion of efficient spectrum utilization by adding new customers to cellular service. Accordingly, we conclude that it is in the public interest to clarify and modify our policy to allow cellular CPE and cellular service to be offered on a bundled basis, provided that the cellular service is also offered separately on a nondiscriminatory basis.

A. Competition in the Cellular CPE Market

8. In our Notice, we indicated that the cellular CPE market appears to be extremely competitive both locally and nationally and that this competition has resulted in the widespread availability of cellular CPE from a multiplicity of vendors. In order to verify these assumptions, we solicited information on cellular manufacturers, including the number of national and international manufacturers and their market shares, and how cellular CPE is distributed today.

9. The record is uncontroverted that the cellular CPE market is extremely competitive, both locally and nationally, and that this competition has resulted in the widespread availability of cellular CPE. The commenters indicate that there are between 17 and 25 CPE manufacturers who distribute more than 28 brands of cellular telephones under both primary and secondary brand labels.[14] They note that CPE is manufactured in the United States, Canada, Japan, and Europe. The parties indicate that, because of relatively low barriers to entry, the number of CPE manufacturers continues to grow annually. The information submitted by the commenters shows that no single manufacturer is dominant and none has a market share in excess of 20%. CTIA points out that, as a result of vibrant competition, the average price of cellular telephones has dropped from $2,500 in 1984 to $400 today.[15] Moreover, CPE is marketed for sale, rent or lease by facilities-based carriers as well as by agents, resellers, independent outlets, specialty shops, automotive dealers, and department stores. In view of the large number of CPE manufacturers competing in the United States cellular industry and the fact that new manufacturers are continuously entering the market,[16] and given the broad national distribution network for cellular CPE, it appears unlikely that one manufacturer can control the market.[17]

B. Competition in the Cellular Service Market

1. The Competitiveness of the Cellular Service Market

10. The Commission tentatively concluded in the Notice that the cellular service market is sufficiently competitive to prevent bundling from adversely affecting competition in the cellular CPE market. In reaching this conclusion, the Commission indicated that the cellular industry has grown considerably and that facilities-based carriers within each market compete not only against each other, both directly and through agents, but also with numerous resellers. It also indicated that the current duopoly structure of the cellular industry "provides the potential for each facilities-based carrier to possess relatively equal power in the service area and protects the public from the dangers of potential anticompetitive abuse arising from the joint provision of cellular service and CPE."[18] Finally, insofar as bundled offerings of cellular CPE and cellular service require that customers obtain service from a specified carrier for a fixed term, we asked whether such agreements might be discriminatory or be used to eliminate competition within the cellular market.

11. The record is not conclusive as to whether the service market is fully competitive.[19] In this regard, in the *Cellular Report and Order*, 86 FCC 2d at 474-82, which established the cellular duopoly market structure, the Commission concluded that "even a marginal amount of facilities-based competition will foster public benefits of diversity of technology, service and price." *Id.* at 478. Although the record contains a limited amount of empirical data, it appears that facilities-based carriers are competing on the basis of market share, technology, service offerings, and service price.[20] However, as the FTC staff points out, the current Commission rules allowing no more than two facilities-based carriers per market place an absolute barrier to entry in the provision of wholesale cellular service.[21] Moreover, while resellers may help deter price discrimination, it does not appear that they compete effectively with the two facilities-based carriers in each market. In addition, while it appears that existing services, such as paging, private radio, certain landline services, and possible future services such as personal communications, Mobile Satellite Service, and specialized mobile radio services have the potential to compete with cellular, the record does not support a finding that they currently constrain facilities-based cellular carriers from acting anticompetitively.[22] Therefore, we agree with the DOJ that in the absence of any evidence (such as price and cost data), it is difficult to conclude that the cellular service market is fully competitive.[23]

12. Finally, the record reveals that an integral part of any packaged offering of cellular CPE and service is the mandatory service requirement. As we noted in the Notice, carriers can use the minimum service commitment as a vehicle for predatory pricing or other anticompetitive conduct only if they can eliminate competition and monopolize the cellular market. *See Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). There is no evidence that this has occurred or is even possible, particularly because the minimum service periods of three months to one year, identified by evidence in the record, are relatively short. *Cf. Comsat*, 5 FCC Rcd 4869 (1990), and *RCA Satcom*, 84 FCC 2d 353 (1980). (These cases involve regulated domestic satellite services and articulate the Commission's recognition of the benefits that such contracts bring to the carrier-customer relationship).

C. Impact of Bundling on Competition in the Cellular CPE Market

13. Even if we were to assume that a facilities-based carrier has the potential to act anticompetitively in its Cellular Geographic Service Area (CGSA), based on the current structural conditions in the cellular service and CPE markets, it appears unlikely that any carrier engaged in bundling would be able to restrict competition in the CPE market. Specifically, the conditions necessary to obtain an anticompetitive outcome do not appear to exist in the cellular industry. First, it does not seem likely that

individual cellular companies which operate in local markets possess market power that could impact the numerous CPE manufacturers operating on a national and international basis. According to CTIA, there are 125 facilities-based cellular system operators in this country and more than 6,000 cellular agents.[24] We agree with the FTC Staff that under these conditions, a CPE manufacturer foreclosed by one cellular service company from its CGSA easily could sell its equipment to other cellular carriers operating in many other CGSAs. Furthermore, we agree with the DOJ that cellular carriers do not have the potential to engage in sustained predatory pricing practices in the CPE retail market. As the DOJ points out, even if the two facilities-based carriers in a market cornered the local retail CPE market and began charging high CPE prices, other CPE providers from outside of the local market could supply retailers with affordable CPE, thus undercutting a carrier's high-priced CPE.[25] Customers, of course, would be able to purchase the lower-priced CPE and obtain cellular service at the same rates as if the customer had bought the CPE from the carrier because cellular service will remain available on an unbundled, nondiscriminatory basis. Under these circumstances, it is unlikely that carriers engaged in bundling could charge supracompetitive prices and still deter retailers from carrying CPE. Thus, we agree with the FTC Staff's conclusion that "[i]f individual cellular service companies do not possess market power in the sale of cellular service on a national level, it is unlikely that foreclosure of the CPE market can be successful."[26] The possibility that one carrier could dominate the CPE market is further diminished by the fact that most carriers do not manufacture CPE and because most cellular service markets are duopolistic rather than monopolistic, a carrier's market power is attenuated.

14. It is also uncontested that there is a robust level of competition that exists in the CPE markets notwithstanding the common marketing practice of packaging CPE and cellular service. This marketing practice of packaging CPE and cellular service has existed for several years and has benefited consumers. Accordingly, we believe that the information submitted in this proceeding reveals that if the Commission clarified its policy to permit bundling, facilities-based carriers engaged in bundling would not be able to adversely affect competition in the cellular CPE market.

15. Finally, two parties allege that facilities-based carriers have entered into exclusive dealing agreements with CPE providers.[27] However, the details of these agreements are not revealed. Therefore, the impact of such arrangements cannot be thoroughly evaluated. Nevertheless, there is no evidence that cellular carriers refuse to provide service to customers that purchase another brand of CPE. Furthermore, although there are general allegations that these exclusive dealing arrangements preclude agents from offering other brands of CPE to customers, no specific evidence has been raised to support these allegations.

16. ICDMA contends that carriers' exclusive dealing arrangements with CPE manufacturers, coupled with their ability to engage in price packaging, creates the potential for anticompetitive abuse. It therefore proposes several safeguards to reduce this potential. First, it states that if a carrier is the exclusive distributor of a particular manufacturer's CPE, the carrier should not be allowed to create price packaging that includes the cellular CPE unless the carrier makes that CPE available to independent retailers in its service area. Second, it provides that carriers should not be allowed to offer price reductions for CPE included in carriers' price packages offered at the retail level (when compared to the stand-alone CPE retail prices offered by the carrier) that are greater than the highest level of activation commissions paid to independent retailers. Third, it asserts that activation term commitments for subscribers purchasing carrier provided retail price packages should be for the same period of time as the term commitments made by subscribers purchasing their service through independent retailers, which thereby earn activation commissions for those retailers.

17. We find that ICDMA's safeguards are not warranted because there is no evidence in the record before us revealing that the anticompetitive abuses which ICDMA is addressing are presently occuring. If such evidence were presented, however, we would consider adopting safeguards similar to those proposed by ICDMA. The record is also void of any evidence showing that these existing exclusive dealing arrangements will potentially have an anticompetitive impact on competition in the CPE market.[28] Accordingly, we do not here adopt ICDMA's safeguard proposals.

18. Furthermore, the record does not demonstrate a reason to be concerned about future exclusive dealing arrangements. First, it appears that carriers are primarily motivated to sell more service and are not particularly interested in entering into such agreements with CPE providers because, as Century has pointed out, their customers demand that they carry the widest variety of CPE possible.[29] Second, if one carrier managed to eliminate all agents and only offered a bundle of service and one CPE manufacturer's CPE, a customer could always go elsewhere or to another carrier to get CPE. Third, current nondiscrimination requirements preclude a cellular carrier from refusing to provide service to a customer on the basis of what CPE the customer owns.[30] Fourth, because cellular service is offered in local markets, exclusive dealing arrangements would not eliminate international and national CPE providers in the absence of a nationwide conspiracy by cellular carriers to eliminate CPE manufacturers. Therefore, it is highly unlikely, even theoretically, that a future exclusive dealing arrangement could be successful in eliminating a CPE manufacturer. Nevertheless, if in the future, it comes to our attention that carriers' exclusive distribution agreements with CPE manufacturers are resulting in anticompetitive abuse, we will not hesitate to revisit this area.

D. The Public Interest Benefits of Bundling Cellular Service & CPE

19. Notwithstanding the state of competition in the cellular service industry, there appear to be significant public interest benefits associated with the bundling of cellular CPE and service.[31] In this regard, the record supports a finding that the high price of CPE represents the greatest barrier to inducing subscription to cellular service.[32] Thus, as several of the commenters, including the DOJ, have pointed out, bundling is an efficient promotional device which reduces barriers to new customers and which can provide new customers with CPE and cellular service more economically than if it were prohibited.[33] Moreover, packaging cellular CPE and service is a common and generally accepted practice in the cellular industry. Finally, the FTC Staff explains that a decision to prohibit introductory discounts "may cause the companies to re-

place these discounts with promotional expenditures that are more costly and less likely to be directly appropriated by the customer."[34]

20. Moreover, with the influx of new subscribers due to the bundling of cellular CPE and service, the fixed costs of providing cellular service are spread over a larger population of users, achieving economies of scale and lowering the cost of providing service to each subscriber.[35] Rapid growth of the subscriber base also promotes the efficient use of the spectrum. In addition, clarifying our policy to allow the bundling of cellular CPE and cellular service furthers the Commission's goal of universal availability and affordability of cellular service and thus promotes the continued growth of the cellular industry.[36] We also find that bundling can assist in the conversion to digital. As the DOJ and the FTC Staff point out, initially, digital deployment will require the use of dual-mode telephones, which will, most likely, be slightly larger, heavier and more expensive than analog models. A prime means of marketing these phones will be through attractively priced packages of service and new equipment.

21. Finally, bundling may be used by carriers as an efficient distribution mechanism. Here, the FTC Staff point out that because a decision as to how to distribute one's product may have a significant impact on the type of service or the quality of the product provided, "interference in these relationships should be approached with caution."[37]

E. Other Considerations

1. Impact on Cellular Service Prices by Permitting Bundling

22. The Commission tentatively concluded in the Notice that consumers are not likely to be harmed by permitting bundling. The Commission stated that modifying the bundling policy probably will not affect cellular service prices. The Commission also indicated that discounted CPE appears to be the result of agents using their commissions to offset or hold down the price of CPE. If CPE discounts are eliminated, it continued, carriers probably will continue to pay their agents commissions because such payments are market driven, and it is unlikely that the cellular service prices would decrease. Because it appears that agents are using their carrier-paid commissions to hold down the prices they charge their customers, the Notice requested comments on whether this is the type of cross-subsidy that public policy should prevent and whether a modification of the bundling policy would adversely affect cellular service prices.

23. Based on the record before us, it appears that subscribers may be benefiting from the current cellular industry practice of bundling cellular CPE and cellular service. As a result of the lower prices for cellular CPE,[38] individuals who would otherwise decline cellular service are becoming subscribers, thereby spreading the cost of providing cellular service. Moreover, there is no evidence that bundling cellular CPE and service has led to an increase in service prices.[39] Nor has evidence been submitted to support the claim that bundling leads to discriminatory cellular service rates. The industry practice is that cellular service is offered separately from CPE on a nondiscriminatory basis.

24. The record is also inconclusive as to whether carriers are using their service revenues to subsidize their bundling practices. As we pointed out in the Notice, discounted CPE appears to be the result of agents using their commissions to offset the original cost of CPE. Thus, even if cellular CPE discounts were eliminated, there is no indication that carriers would not continue to pay their agents commissions because these commissions appear to be market driven. Nevertheless, as the DOJ and the FTC Staff agreed, it is unlikely that any profit maximizing firm would set its service rates based on the size of the commissions paid to agents.[40] Moreover, there is no convincing evidence that if these packaging practices were eliminated, cellular service prices would decline. In any event, the potential anticompetitive impact from this type of bundling is outweighed by the public interest benefits associated with the bundling of cellular service and CPE. Finally, we agree with the DOJ that even if the elimination of bundling led to a reduction in the commissions carriers paid their agents, there would likely be a negligible effect on the marginal cost of cellular service and, therefore, no discernible impact on service rates.

25. In the Notice we tentatively concluded that the lack of state regulation of the cellular industry reflects the competitiveness of the industry and a decreasing concern that carriers are using largely untariffed cellular service to act anticompetitively in the unregulated CPE market, i.e., by raising cellular service prices to subsidize low cost CPE. The record reveals that cellular service is unregulated at the federal level and largely unregulated at the state level.[41] Moreover, it appears that most of those states that do regulate cellular service do not exercise rate-of-return regulation. While the non-regulation of cellular service does not in itself demonstrate that the cellular service market is competitive, it does suggest that state PUCs have chosen not to regulate cellular service because they do not consider it a monopoly service. In addition, the lack of regulation based on rate-of-return principles, combined with the absence of monopoly status for cellular carriers, significantly reduces one important motive for carriers to bundle --to build unregulated CPE costs into the service rate base and cross-subsidize at the expense of the subscriber. As the DOJ notes, "absent a guaranteed return on their cellular service investments, carriers cannot expect to recover CPE discounts by including it [the amount of the CPE discounts] in their rate base."[42] We agree with this conclusion.

2. Impact on Resellers

26. In our Notice, we requested comments on the extent to which the elimination or substantial modification of the cellular CPE bundling policy would affect resellers, and the extent to which this impact should be taken into account in formulating our bundling policy.

27. The record is inconclusive as to what extent resellers would be affected if facilities-based carriers were allowed to bundle cellular CPE and cellular service. On the one hand, many of the parties argue that resellers have not submitted specific evidence demonstrating that the current carrier practice of packaging cellular CPE and cellular service has had an adverse impact on resellers. On the other hand, other commenters, such as NCRA and NACA, argue that the anticompetitive effects of bundling are driving resellers out of business because they are unable to compete for new cellular subscribers. They argue that, unlike facilities-based carriers, resellers do not have service

revenues that subsidize bundling practices. NCRA also claims that the number of resellers in existence today that are not affiliated with a facilities-based carrier is small and is declining.[43]

28. As the FTC Staff points out, in a case such as this where resellers are alleging that carriers are engaging in predatory pricing practices, (i.e., offering wholesale cellular service to resellers at an inflated non-cost based price and at the same time reducing the retail price charged by their retail arms through commissions or other incentive payments), it is difficult to differentiate between such predatory practices and intense retail competition that includes the use of an efficient distribution system.[44] We agree with the FTC Staff and the DOJ that the most efficient government policy is to allow firms the ability to choose how to distribute their own products.[45] Thus, to the extent that elimination of the bundling prohibition allows facilities-based carriers to utilize their preferred distribution systems more intensively, and to the extent that resellers are not part of the facilities-based cellular carriers' preferred retail distribution systems, resellers may not benefit from the elimination of the bundling prohibition.[46] Nevertheless, the possibility that one type of retailer may be harmed "does not provide a basis for a rule that limits the use of a potentially efficient contract or retail distribution system."[47] This is especially the case here where the resellers primary concern appears to stem from the rate structure that they are held to by the carriers and not the carriers' practices of offering cellular CPE and service on a bundled basis.[48] Moreover, the DOJ further explains that since resellers will remain able to obtain CPE to offer their customers together with service, the sole effect of allowing carriers to bundle will be to put the resellers in the same position that any distributor faces when its supplier engages in dual distribution.[49] We agree with the DOJ that "[s]uch dual distribution does not, in itself, raise anticompetitive effects." Finally, we note that the record shows that resellers also offer promotional packages of cellular CPE and transmission service.[50]

IV. CONCLUSION

29. As we noted in the Notice, packaged offerings are commonplace in a variety of industries in which customers can purchase an array of products in a package at a lower price than the individual products could be purchased separately.[51] However, the Commission's prohibition of bundled offerings in the *Second Computer Inquiry* was based on the concern that subscribers have the ability to choose their own CPE and service packages and that they not be forced to buy unwanted carrier-supplied CPE in order to obtain transmission service. Based on our analysis of the cellular industry, we have found that while the cellular CPE industry is competitive, we are unable to conclude that the cellular service market is fully competitive.

30. Nevertheless, we do not believe that the potential for cellular carriers to engage in anticompetitive conduct provides a strong reason to prohibit bundling *per se*. Despite our concerns about the status of competition in the cellular service market, the records supports the conclusion that clarifying the current bundling policy to allow facilities-based carriers to bundle cellular CPE and service would not have an adverse impact on the cellular CPE market. Moreover, the theoretical potential for this or other anticompetitive behavior is outweighed by the public interest benefits of permitting bundling. These benefits allow customers to obtain a wide assortment of combined CPE and service from numerous sources, including the carriers and their agents. Accordingly, we will adopt our initial proposal and allow cellular CPE and cellular service to be offered on a bundled basis, provided that the service is also offered separately at a nondiscriminatory price.[52] This policy will ensure that facilities-based carriers who provide cellular CPE and cellular service on a packaged basis will continue to be required to offer cellular service to agents, resellers and other customers at a nondiscriminatory rate.[53] We wish to emphasize that our responsibility is to assure that the public interest, including maintaining a level playing field and fostering competition, maximizes benefits to subscribers.[54]

31. While we recognize the customer benefits of CPE discounting as a part of the sale of cellular service, we intend to monitor the bundling of cellular service and cellular CPE. Our continuing interest is based on our intention that bundling not be used anticompetitively. If parties can demonstrate that carriers' incentive offerings lead to anticompetitive abuses, the Commission will be open to further action.

32. Finally, the parties generally agree with our position in the Notice that there is no reason to institute a federal bundling policy that preempts state action in this area. Acordingly, while we modify our current cellular bundling policy, we will not preempt state regulatory action even if it is more restrictive.

V. ORDERING CLAUSES

33. Authority for the changes to the bundling policy adopted herein is contained in Sections 1, 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j) and 303(r).

34. Accordingly, IT IS ORDERED that the Commission's cellular bundling policy is clarified and modified as set forth above.

35. IT IS FURTHER ORDERED that the changes made herein WILL BECOME EFFECTIVE (30) days after publication in the Federal Register.

36. IT IS FURTHER ORDERED that this proceeding is HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS

1. ALLTEL Mobile Communications
2. Bell Atlantic Mobile Systems, Inc.
3. BellSouth Corporation
4. Bentley Telecommunications, Inc.
5. Block Properties Company, Inc.

6. California Public Utilities Commission
7. Cellnet Communications, Inc.
8. Cellular Communications, Inc.
9. Cellular Marketing, Inc.
10. Cellular Sales, Inc.
11. Cellular Service
12. Cellular Telecommunications Industry Association
13. Centel Cellular Company
14. Century Cellunet, Inc.
15. GTE Mobilnet Incorporated
16. Independent Data Communications Manufacturers Association
17. McCaw Cellular Communications
18. MCI Telecommunications Corporation
19. Michigan Department of Commerce
20. National Cellular Resellers Association
21. North American Telecommunications Association
22. NYNEX Mobile Communications Company
23. PacTel Cellular
24. Southwestern Bell Mobile Systems, Inc.
25. Tandy Corporation
26. Telocator
27. United States Telephone Association
28. Don Philpott
29. David Wolber

LIST OF REPLY COMMENTERS

1. Ameritech Mobile Communications
2. Bell Atlantic Mobile Systems
3. BellSouth Corporation
4. Cellnet Communications, Inc.
5. Cellular Communications, Inc.
6. Cellular Marketing, Inc.
7. Cellular Sales, Inc.
8. Cellular Telecommunications Industry Association
9. Centel Cellular Company
10. Houston Cellular Telephone Company
11. Independent Data Communications Manufacturers Association
12. McCaw Cellular Communications
13. National Cellular Resellers Association
14. North American Telecommunications Association
15. NYNEX Mobile Communications Company
16. PacTel Cellular
17. Southwestern Bell Mobile Systems, Inc.
18. Staff of the Bureau of Economics of the Federal Trade Commission
19. Telocator
20. US West Newvector Group, Inc.
21. US Department of Justice

FOOTNOTES

[1] *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 6 FCC Rcd 1732 (1991), *appeal dismissed, National Cellular Resellers Association v. FCC*, No. 91-1269 (D.C. Cir. April 2, 1992).

2 *See* Appendix A for list of commenters. Late-filed pleadings were filed by David A. Wolber, Don Philpott, John Webb and David M. Block. We will accept these comments in the interest of obtaining a complete record upon which to base our decisions in this proceeding. On May 10, 1991, the National Association of Cellular Agents (NACA) requested a 90 day extension of time to file comments. By *Order*, Mimeo No. 13260 (May 28, 1991), the Common Carrier Bureau denied the request, finding that NACA had failed to show good cause for the requested 90 day extension of time.

[3] Reply comments were originally scheduled to be filed on June 4, 1991. On May 28, 1991, in response to a request from Telocator, the deadline for filing reply comments was extended to June 19, 1991. *See Order*, 6 FCC Rcd 3374 (1991).

[4] Ex parte comments were filed by several parties and, in accordance with Section 1.1206 of our rules, have been made part of the record in this proceeding.

[5] We have analyzed all of the arguments contained in the comments before resolving this Rule Making proceeding. However, not all of the points raised in the comments are discussed in the Report and Order for reasons of brevity.

[6] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Second Computer Inquiry*), *Final Decision*, 77 FCC 2d 384; *modified on recon.*, 84 FCC 2d 50 (1980); *further modified* 88 FCC 2d 512 (1981), *aff'd sub nom., Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon.*, FCC 84-190, (released May 4, 1984).

[7] *Id.* at 443-43, para. 149.

[8] *Id.* at 444-45, para. 154.

[9] *Cellular Communications Systems* (*Cellular Report and Order*), 86 FCC 2d 469, 497 (1981) *modified*, 89 FCC 2d (*Reconsideration Order*), *further modified*, 90 FCC 2d 571 (1982) (*Further Reconsideration Order*) *appeal dismissed sub nom. U.S. v. FCC*, No. 82-1526 (D.C. Cir. March 3, 1983).

[10] NCRA indicated in its petition that it had filed pleadings in another proceeding concerning the Commission's cellular resale policies and that those pleadings referenced the Commission's unbundling policy. *See* Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719 (1991). NCRA requested that the pleading filed in the resale proceeding be incorporated in its petition dealing with bundling.

[11] Accordingly, we declined NCRA's request to act formally on its petition for declaratory ruling at that time.

[12] On June 3, 1991, NCRA filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit of the Commission's decision in *Bundling of Cellular Customer Premises Equipment and Cellular Service. National Cellular Resellers Association v. FCC*, D.C. Circuit No. 91-1269. That proceeding was dismissed on April 2, 1992. *See* note 1, *supra*.

[13] We also requested comment on the relative importance of the factors incorporated into our analysis and on any other factors that we did not address. CTIA asserts that in analyzing the effects of packaging on consumer welfare, the Commission should utilize the Sherman Act antitrust standard applied in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984). Under that standard, tying arrangements are *per se* illegal. CTIA argues that illegal tying arrangements do not exist in the cellular industry because consumers are not being forced to purchase CPE. We decline to adopt CTIA's narrow standard which focuses exclusively on anticompetitive effects because, as the Commission has noted in the past, the public interest standard encompasses matters that go beyond the promotion of competition. *Cellular Report and Order*, 86 FCC 2d at 486.

[14] *See, e.g.*, Herschel Shosteck Associates, Ltd., *Advance Data Flash Cellular Brand Sales*, Vol. 6, No. 2, Quarterly Survey (September 1991).

[15] CTIA Comments at 13.

[16] *See, e.g.*, Rhonda L. Wickham, *Plenty of Portables*, Cellular Business, Vol. 8, June 1991.

[17] For its part, the North American Telecommunications Association (NATA) argues that a finding now that the CPE market is competitive does not justify a reversal of the unbundling requirement, because the Commission in the *Cellular Report and Order* relied on the existence of CPE competition when it mandated the unbundling of cellular CPE. NATA Comments at 12. We agree with NATA that it would be insufficient to permit bundling based solely on a finding that the CPE market is competitive. Nevertheless, the competitiveness of the CPE market is an important factor for purposes of determining whether to modify the cellular bundling policy. The Commission in the *Second Computer Inquiry* stated that:

If the markets for the components of the commodity bundle are workably competitive, bundling may present no major societal problems as long as the consumer is not deceived concerning the content of the bundle. *Second Computer Inquiry*, 77 FCC 2d at 443 n.52. Moreover, as discussed below, in addition to considering any concerns that flow from the status of competition in the relevant markets, we have also examined the public interest benefits of permitting bundling.

[18] Notice at para. 13.

[19] NCRA argues that, in analyzing whether the cellular market is fully competitive, the Commission in the Notice should have utilized the same standards used to evaluate market conditions in the interexchange markets, citing *Interexchange Market Regulation Order*, 5 FCC Rcd 2627, 2639-40 (1990). It asserts that the application of different standards is arbitrary and capricious unless the Commission can offer a reasonable explanation. As discussed below,, our decision in this proceeding is not dependent on a conclusion that cellular service markets are fully competitive. Accordingly, we need not address NCRA's concerns regarding the market analysis suggested in the Notice.

[20] Several parties argue that in some markets, the cellular service prices are similar, but there is no indication that anticompetitive conduct is occurring. As we stated in the *Cellular Resale Notice of Proposed Rule Making and Order*, 6 FCC Rcd 1719 (1991), "similarity in price without more may equally indicate vigorous price competition between facilities-based carriers in the same market." *Id.* at 1725, citing Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusal to Deal*, 75 Harv. L. Rev. 655 663-73 (1962).

[21] According to the FTC Staff, the Herfindahl-Hirschman Index, which is used to measure the extent of market concentration, indicates that the cellular service market would be 5000, well above the highly concentrated threshold contained in the Department of Justice Meger Guidelines. FTC Staff Comments at 11-12.

[22] NCRA and Tandy point out that the Commission in Competitive Carrier Rule Making, 98 FCC 2d 1191, 1204 n.41 (1984), classified facilities-based carriers as "dominant carriers," a classification which suggests that both carriers in each market jointly possess market power and are capable of engaging in anticompetitive conduct. NCRA asserts that the Commission has not reclassified facilities-based carriers as non-dominant and that eliminating or modifying the bundling policy requires a demonstration that cellular service carriers do not exercise market power. Therefore, it asserts that the Commission's tentative conclusion that the cellular service market is sufficiently competitive so that bundling would not affect competition in the cellular CPE market is unsupported. NCRA Comments at 9 n.9. We do not agree that the Competitive Common Carrier Rule Making requires that carriers must be found non-dominant before the bundling policy is modified. The Commission's classification of carriers as dominant or nondominant in the Competitive Common Carrier Rule Making does not, without further analysis, determine whether carriers should be allowed to bundle cellular CPE and transmission services. We must take into account other factors, including the impact on competition in the cellular CPE market and the public interest benefits of bundling. To the extent that NCRA and Tandy challenge the Commission's conclusion that bundling would not affect competition in the cellular CPE market, see discussion in paras. 13-18, *infra*.

[23] The DOJ Comments at 5.

[24] CTIA Comments at 14.

[25] The DOJ Comments at 8-9.

[26] FTC Staff Comments at 23.

[27] Cellnet, a reseller in the Detroit area, maintains that it has been foreclosed from marketing certain brands of CPE by virtue of exclusive arrangements between particular manufacturers and one of the facilities-based carriers in the Detroit market. Cellnet Comments at 11. In addition, Cellular Marketing, Inc., an independent agent and reseller in the Houston area, also contends that such exclusive arrangements between one of the facilities-based carriers in the Houston area and certain cellular CPE suppliers have prevented its agents from buying CPE at the lowest cost. Cellular Marketing Comments at 5. No more specific details are provided.

[28] We indicated in the Notice that exclusionary conduct reducing the likelihood of price decreases should be considered a form of monopoly or market power because such conduct can delay or prevent prices from falling by preventing the entry of or raising the costs of more efficient competitors. *See* Krattenmaker, Lande, and Salop, Monopoly Power and Market Power in Antitrust Law, 76 Georgetown L.J. 241, 259 (1987). In this regard, there is no evidence in the record to show that, in those instances where cellular carriers have entered into exclusive distribution agreements with CPE manufacturers, CPE prices have increased or that CPE competition has diminished.

[29] Century Comments at 4.

[30] Several parties, such as NCRA, NACA and Tandy, argue that, in the long run, allowing duopolists with market power to bundle cellular CPE and service drives out independent CPE competition, reduces the number of CPE/service choices to two, and eventually leads to higher service prices. This worst case scenario is unlikely to occur for the reasons stated above. For there to be only two CPE offerings nationwide would require a conspiracy of cellular carriers to eliminate CPE manufacturers. Such anticompetitive conduct could be prevented through application of the state and federal antitrust laws.

[31] As we pointed out in the Notice, packaged offerings are commonplace in a variety of industries in which customers can purchase a number of goods in a package at a lower price than the individual goods could be purchased separately. Moreover, under the federal antitrust laws, packaged offerings are legal unless they constitute an illegal tie-in or represent an unlawful exercise of monopoly power. *See Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (195); and *Hunt -Wesson Foods, Inc., v. Ragu Foods, Inc.*, 627 F.2d. 919, 924 (9th Cir. 1980).

[32] The majority of the commenters believe that the increasing rate of cellular subscribership in the United States is, in large part, due to the sharp price reductions of cellular telephones. *See e.g.*, CTIA Commments at 5-6; Cellular Communications Comments at 13; and New Vector Reply Comments at 2.

[33] NCRA maintains that unless evidence has been submitted showing that the joint provisioning of cellular service and CPE yields some production efficiency, the cost of bundled service and CPE can never be appreciably lower than the sum of the cost of each component. NCRA Comments at 17. However, as the FTC Staff has pointed out, packaged offerings can be used to reduce transaction and information costs as well as to lower the cost of distributing the products. FTC Staff at 16-17.

[34] FTC Staff Comments at 17-18.

[35] CTIA points out that in January 1985, the capital investment per subscriber was $3872.93; in January 1988, it was $1951.11; and in January 1991, it was $1189.01. CTIA Comments at 19.

[36] Centel Comments at 3-4.

[37] FTC Staff Comments at 14.

[38] For example, Century notes that in 1988, the average price of a cellular telephone was $1,000, while in 1990 the average price was $400. Century Comments at 2.

[39] According to NCRA, cellular is a declining-cost industry; each carrier's ratio of fixed-to-total costs is very high; original plant has been substantially depreciated; and consumer demand grows at tremendous rates each year. NCRA contends that under these conditions, rates should be falling. NCRA Comments at 10-11. However, McCaw cites industry studies showing that from 1987 to 1991, cellular service prices declined in absolute terms in one third of the top 30 markets and in additional markets when adjustments for inflation are considered. McCaw Reply Comments at 9.

[40] In this regard, NCRA and Tandy argue that bundling causes existing cellular subcribers to subsidize CPE purchases from new users. NCRA Comments at 18-19; Tandy Comments at 19-20. We reject this argument. As DOJ has observed, this argument presumes that carriers set their rates on the basis of their average costs. However, in the short run, profit-maximizing carriers will set their rates based on variable costs, *i.e* the costs they can control by increasing or decreasing output. DOJ states that demand requires a carrier to try to maximize the difference between revenue and total variable cost. Once the carrier has signed up a new customer, the commission it paid its agent is a sunk cost that has no unique impact on the variable cost of providing cellular service. Thus, the service rate charged would not vary with the size of commissions paid to agents. DOJ Comments at 10-11. In short, the CPE expenses are treated as any other cost of securing a subscriber, *e.g.*, advertising.

[41] CTIA submits data showing that 12 states fully regulate cellular service, 12 are partially regulated and the remaining states impose no regulations. According to CTIA, a state which regulates cellular service requires a Certificate of Public Convenience and Necessity (CPCN) and tariffs, for both wholesale and retail offerings. A state which partially regulates typically requires a CPCN and tariffs at the wholesale level but not at the retail (subscriber) level. A state that is not regulated does not require cellular carriers to obtain CPCN's or file tariffs. CTIA Comments at Attachment D.

[42] The DOJ Comments at 29.

[43] NCRA Comments at 14.

[44] FTC Comments at 13-14.

[45] *Id.* at 15.

[46] *See* FTC Staff Comments at 15.

[47] *Id.* at 15.

[48] Any restrictions on resellers' ability to buy packages of CPE and service on the same basis as other customer would be unlawful. See Petitions for Rule Making Concerning Proposed Changes to the Commission's Resale Policies, (Cellular Resale NPRM/Order), 6 FCC Rcd 1719 (1991). Resellers also appear to be concerned that service prices may be subsidizing CPE prices in packaged offerings. NCRA Comments at 3. In this regard, see para. 24, *supra* and note 53, *infra*.

[49] The DOJ Comments at 12.

[50] NYNEX states that resellers have offered promotional packages where the facilities-based carriers or its retail affiliate do not offer such packages. NYNEX Comments at 10. *See also* Southwestern Bell Comments at 14.

[51] *See* Notice, 6 FCC Rcd at 1737, n.21.

[52] In addition, we note that cellular carriers will still have to comply with all applicable state and federal antitrust laws. *See, e.g.*, Section 3 of the Clayton Act, 15 U.S.C. Section 14.

[53] In its petition for declaratory ruling filed on December 23, 1988, NCRA contended that carriers' bundling or packaging practices are inconsistent with our decision in AT&T Opportunity Calling, ENF-84-36,E-84-28 (released April 4, 1985) (*Opportunity Calling*). NCRA maintained that carriers' offerings patently discriminate in favor of new customers who receive a discount or rebate and against customers who do not receive such a discount or rebate. We disagree with NCRA that the Common Carrier Bureau's (Bureau) decision in *Opportunity Calling* provides a basis for finding that cellular carriers' bundling or packaging practices are impermissible. In *Opportunity Calling* the Bureau indicated (in dictum) that circumstances could arise in which rate preferences for new customers might be unlawful. As indicated earlier, however, cellular service is not subject to cost based rate-of-return regulation and there is no conclusive evidence here that cellular carriers use their cellular service revenues to subsidize their bundling practices. Hence, the record does not support a finding that new cellular customers are receiving rate preferences for cellular service through cross-subsidization. Moreover, as discussed in paras. 19-21, supr a, bundling is an efficient promotional device which appears to create benefits for all cellular customers.

[54] In view of our determination that such bundling activities are not precluded under our new policy, we reaffirm our dismissal of NCRA's petition for declaratory ruling filed on December 23, 1988. As noted above, the record before us does not support NCRA's petition.

Separate Statement
of
Commissioner Ervin S. Duggan

Concurring in Part and Dissenting in Part

In re: Bundling of Cellular Customer Premises Equipment and Cellular Service (CC Docket No. 91-34)

In this item, the Commission creates a limited exception to its long-standing policy prohibiting the bundling of telephone service and customer equipment. In large part I agree with the Commission's action; I agree that in the cellular market, the common practice of selling attractively-discounted equipment with service has public interest benefits and therefore should be permitted. Those benefits--- lower customer equipment prices and greater loading of cellular systems--- do indeed appear to outweigh the competitive risks in this special marketplace.

I dissent from the item, however, insofar as the Commission fails to deal with the fact that customers who do not buy bundled service and equipment are, in effect, required to subsidize those who do.

The widespread practice in the cellular business is to sell cellular telephones below cost--- often as much as $300 or more below cost. When a retailer or agent such as Radio Shack or Sears sells a discounted phone, it uses a portion of the commission payment it receives from the cellular carrier to subsidize the cost of the phone. This discount in essence represents a "rebate" off the true price of the phone.

That rebate amount is available, however, only to customers who buy a bundle--- a package deal of phone and service. What about the customer who already has a cellular phone and wishes to sign up only for service? That customer generally receives no rebate; nor does the cellular company generally offer service to that customer at a lower price. Similarly, if a customer already receives cellular service and wants to replace his cellular phone, the cellular company might not offer that customer a discount on the phone: discounts generally are offered to new customers only.

The net result is that customers who buy bundles benefit from telephone equipment priced well below cost--- while customers who do not buy bundles, and who receive no such benefit, in effect subsidize those who buy bundled equipment and service. Below-cost equipment bundling, moreover, makes it difficult for cellular resellers to buy service alone and resell it, because they, too, must subsidize the equipment discounting.

The Commission in this item, by asking no serious questions about this apparent discrimination, in effect blesses it--- believing it, perhaps, too small a matter to care about. Small though the matter may be, it strikes me as worth asking whether unbundled service offerings should be cheaper than bundled ones. If they are not, customers will have little incentive to shop separately for equipment and service. And the practice of bundling below-cost equipment with service may also dilute the competitive pressure that might force prices for cellular service downward. At present there is almost no head-to-head service price competition between carriers at the point of purchase. Why? Because cellular carriers generally have exclusive dealing arrangements with their retail agents. Instead of playing service providers off against one another and forcing them to lower service prices competitively, many retailers are trapped in an exclusive relationship that discourages competition. The marketing focus is almost entirely on the price of equipment---not on the price of service.

To deal with this anomaly, we need not be harshly regulatory and banish the bundling of below-cost equipment. One possible solution might be to encourage or require cellular carriers to pass through the benefits of bundling to those customers who choose to buy service only. Thus, for example, if a carrier sold equipment at a discount to customers who sign up for service, it might offer a commensurate rebate to customers who sign up for service but who do not wish to buy a phone. Alternatively, a carrier might choose to offer a lower service rate to customers who do not buy bundled equipment. In either case, a small but real discrimination against consumers would be cured: The carrier would provide comparable incentives to customers who wish to sign up for service only as it provides to customers who choose to buy both service and equipment. At least one cellular company has begun to experiment with such an approach.

The cellular industry has been a remarkable success story for this country. It has created a valuable service where none existed before. The FCC can take justifiable pride in that development. Nevertheless, I am discouraged by the Commission's insouciance here. In my judgment, we should be eager to ensure that customers have a full range of options, and that the competitive pressure on cellular rates is as intense as possible. Instead, the Commission strikes me as hesitant to acknowledge the problem and to look for solutions.

While supporting much that I find in this item, therefore, I must dissent in part.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-122

In Re Application of

CALVARY EDUCATIONAL BROADCASTING NETWORK, INC. File No. BRH-891103UA

For Renewal of License of
KOKS(FM), Poplar Bluff,
Missouri

HEARING DESIGNATION ORDER

Adopted: May 29, 1992; Released: June 12, 1992

By the Commission:

1. The Commission has before it: (i) the captioned application for renewal of license filed by Calvary Educational Broadcasting Network, Inc., ("Calvary"), licensee of station KOKS(FM), Poplar Bluff, Missouri; (ii) petitions to deny filed by Mrs. Jean Hillis and Mrs. Doris Smith ("Hillis and Smith") on December 23, 1989, alleging numerous instances of blanketing interference complaints which were not satisfactorily resolved by KOKS, in violation of 47 C.F.R. § 73.318; (iii) the Mass Media Bureau's ("Bureau") October 30, 1990 *Order* that the station remedy the blanketing problem for certain complainants and advise others of possible ameliorative steps to reduce the interference; (iv) Calvary's February 25, 1991 compliance report; (v) Hillis and Smith's March 25, 1991 response to the report; (vi) a field investigation report from the Commission's Field Operations Bureau ("FOB"), dated February 21, 1992; and (vii) related filings.[1]

2. *Background.* KOKS began broadcasting as a new noncommercial educational FM station pursuant to program test authority on September 29, 1988.[2] Soon after KOKS went on the air, residents of Poplar Bluff ("complainants"), including many who resided near the new KOKS tower, began complaining of interference to their television and radio receivers. The complaints were directed to the station and to the Commission's Kansas City field office. An investigation by the Commission's Field Operations Bureau subsequently revealed that KOKS was causing the interference through FM blanketing, a phenomenon whereby the strong signal from a nearby tower can completely overwhelm receivers in the FM and TV bands. KOKS thereafter was directed by the staff to resolve all blanketing complaints, as required under the Commission's blanketing rule, 47 C.F.R. § 73.318.[3]

3. After KOKS' failure to satisfactorily resolve many of the complaints, Hillis and Smith became the spokespersons for the community in this matter, and each filed a petition to deny KOKS's license renewal on Dec. 23, 1989. They subsequently mailed over 900 complaint petitions to the station and the Commission. In their petitions, Hillis and Smith detail the extent of interference, which spans the entire VHF TV and much of the FM band. Hillis and Smith also charge Calvary with misrepresenting the facts to the Commission concerning the nature and extent of the problem.

4. In its January 22, 1990 opposition, Calvary states, *inter alia*, that Hillis and Smith are outside the Grade B contour of station WPSD-TV, Paducah, Kentucky and thus "Calvary is not breaking any rules by interfering with their reception" of that station. Opposition, at 2.[4] Furthermore, Calvary states that it "has never knowingly misrepresented facts concerning its broadcast service or its response to the investigation to the Commission. It *has* made errors, which it has attempted to correct when it discovered the errors or [when] they were pointed out to the station management," and "[f]or a non-profit licensee operations with a largely volunteer staff, Calvary has done its level best to resolve the interference complaints that it can." (emphasis in original) Opposition, at 3-4. Hillis and Smith's February 6 reply notes that the interference existed as to four television stations, not merely WPSD-TV,[5] and reiterates that Calvary has misrepresented its success in resolving the interference complaints.

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[1] These include Calvary's January 22, 1990 opposition, Hillis and Smith's February 6, 1990 reply, and numerous informal objections to the license renewal. In addition, more than 900 blanketing complaints have been lodged with the station and the Commission. The Commission has also received petitions signed by several hundred Poplar Bluff residents urging renewal of KOKS(FM)'s license and expressing interest in continued service from the station.

[2] Construction permit BPED-870302MS was granted on October 30, 1987. The application for license to cover that permit, BLED-880906KB, was granted on January 4, 1989.

[3] The *Report and Order* which adopted the FM blanketing rule states that "FM blanketing occurs when an FM station's signal strength or signal power density is of such magnitude that it causes [FM and TV] receivers near the transmitting antenna to be partially or completely blocked from receiving other broadcast stations." *FM Broadcast Station Blanketing Interference*, FCC 84-514, 57 RR 2d 126 (1984) (*"FM Blanketing"*). Under 47 C.F.R. § 73.318(b), a new station causing FM blanketing "must satisfy all complaints of blanketing interference which are received by the station during a one year period" beginning with the commencement of program tests and which are received from complainants who reside within the station's 115 dBu blanketing contour. Additionally, pursuant to Section 318(d), the station must provide complainants filing after the one-year cutoff point, as well as complainants residing outside the blanketing contour, with "technical information or assistance" in solving the problem; the station owes no financial duty to these complainants. While "[m]obile receivers... and high-gain antennas or antenna booster amplifiers" are excluded from the provisions of 47 C.F.R. Section 73.318, a station's duty to complainants residing within the 115 dBu contour, who filed timely complaints, is to repair all radio and television receivers. *See* 57 RR 2d at 130.

[4] We note that the FM blanketing rule does not limit a licensee's responsibility to complainants residing within the Grade B contour of television stations.

[5] The four stations identified by the complainants are: WPSD-

5. On April 27, 1990, the Bureau sent a letter to Calvary and to Hillis and Smith. This letter requested that the parties each locate and indicate the residences of 700 complainants on a provided topographic map of the Poplar Bluff vicinity. *Letter to Don Stewart, Jean Hillis, and Doris Smith*, reference 8920-BE (Chief, Audio Services Division, April 27, 1990). When the information was returned, the Bureau divided the list of names into three groups. Group "A" was composed of 220 residents who lived within the blanketing contour and complained within one year of the program test date, or by September 29, 1989. Group "B" consisted of complaining residents residing outside the blanketing contour who also lodged their complaints before September 29, 1989. Group "C" consisted of residents who filed a complaint after September 29, 1989, or who filed an undated complaint. After receiving 260 pages of additional complaints from Hillis and Smith, the Bureau sent a June 18, 1990 letter to the parties explaining several procedural matters, including the Commission's *ex parte* rules, providing KOKS(FM)'s counsel with copies of the additional complaints, and setting up a procedure for counsel to review the Commission's files on this case. *Letter to Don Stewart, Jean Hillis, and Doris Smith*, reference 8920-JKK (Chief, Audio Services Division, June 18, 1990).

6. On October 30, 1990, the Bureau again ordered Calvary to comply with the provisions of 47 C.F.R. § 73.318. *Order in re Application of Calvary Educational Broadcasting Network, Inc. For Renewal of License of Station KOKS (FM)*, reference BRH-891103UA, (Chief, Audio Services Division, October 30, 1990) (*"Order"*). The *Order* stated that Calvary "shall satisfy all complaints of blanketing interference by persons listed in [Group] A attached hereto, within 120 days of the date of this letter. IT IS FURTHER ORDERED, that Calvary...shall provide all complainants listed in [Groups] B and C...with technical information and assistance in alleviating this blanketing interference problem." *Id.* at 3.[6]

7. Calvary sent the Commission its final progress report on February 25, 1991.[7] The KOKS reports detailed information about its efforts to contact Poplar Bluff residents about the blanketing problem, and recorded 105 home visits to install filters to remedy the interference problem.[8] Hillis and Smith were given the opportunity to review Calvary's reports, and submitted a response dated March 25, 1991, which disputed Calvary's reports. Hillis and Smith's response includes 81 notarized statements from A list residents, including 65 residents who had a home visit, and 45 notarized statements from B list complainants. Each statement detailed that particular resident's level of dissatisfaction with Calvary's efforts to solve the blanketing problem.[9]

8. After a thorough review of the parties' arguments and data, the Bureau concluded that the wide disparity between the KOKS reports and the Hillis and Smith response required a second field investigation. This investigation, conducted by the FOB, involved: (i) inspection of the station, including its transmitter logs; and (ii) home visits to a selected, representative sample of 14 complainants -- those whose blanketing problems had been represented to be corrected by the station but which, according to the Hillis and Smith response, remain uncorrected -- to monitor and record their television reception with KOKS both on and off the air.[10] The FOB report

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TV, Channel 6, Paducah, Kentucky; KAIT-TV, Channel 8, Jonesboro, Arkansas; KFVS-TV, Channel 12, Cape Girardeau, Missouri, and KPOB-TV, Channel 15, Poplar Bluff, Missouri.

[6] *Id.* at 4. The October *Order* also required that KOKS submit progress reports to the Commission every 30 days regarding this matter, and stated that Group B and C residents could be assisted through a "mass mailing containing relevant information" or establishing a telephone "hotline" to deal with questions.

[7] Calvary filed three periodic reports regarding its efforts, as required by the *Order*. We will consider all of KOKS' submitted evidence as one "final report" package.

[8] In its reports, Calvary states that it purchased 160 FM filter traps from Microwave Filter Company of Syracuse, New York ("MFC"), with the intent of fixing Televisions on the A list with these traps. The traps are simple, notched devices that are installed on the antenna to block the interfering FM signal. Calvary then sent letters to over 700 homes on the B and C lists and recommended the MFC trap or a similar trap to fix the blanketing problem. Calvary also sent letters to the 220 A list homes, asking A list residents whether they wanted a home visit at no charge to correct the blanketing problem. After sending a second letter to A list residents and following up with phone calls, Calvary identified 105 residents who requested home visits. Calvary made those home visits in January and February, 1991, installing one FM trap per household on one TV set per household. Calvary's final report contained a one page summary, plus work forms from the 105 homes visited, and typed notes regarding Calvary's efforts to contact all complainants. In the summary, KOKS stated that only three B list residents complained that the FM trap did not work, so "information was given on the telephone and also a letter was sent giving them information of a new filter and where this filter could be purchased." With regard to the A list complainants: "Calvary Educational Broadcasting Network (KOKS) FM has gone beyond what the FCC regulations say that we had to go by taking FM blanketing out of Channel 6 out of Paducah, KY. and in most cases restoring reception of Channel 6. This was all done at the expense of KOKS the average cost per home visit was $65.00." Calvary's work forms, signed and notarized by the station engineer and in most cases signed by the resident, show the following:

105 homes visited;

90 homes, reception totally cleared up;

12 homes, reception improved;

3 homes, no improvement;

Of the 105 home visits, 15 residents refused to sign the work form. The reports conclude that, of the 115 A list residents not receiving a home visit:

6 people have moved out of the blanketing area;

14 people report no interference;

42 people declined the offer for a home visit;

53 people did not respond at all.

[9] These residents stated, *inter alia*, that: (i) normal television and FM reception has not been restored; (ii) there is continuing dissatisfaction with reception and a lack of candor by KOKS in not reporting this fact; and (iii) none had more than one television or any FM radio serviced by KOKS.

[10] Six of these fourteen came from the 90 homes in which KOKS claimed that the blanketing interference had been cleared up, *see* footnote 8, *supra*. Seven others came from prior correspondence in which the licensee claimed that the blanketing problems had been cured by installation of a filter. *See* KOKS correspondence dated February 10, 1989, February 24, 1989, and September 22, 1989. The fourteenth home visited was

("field report") dated February 21, 1992, contained the following findings: (i) none of the 14 homes visited had all reception problems addressed, as KOKS installed at most one notch filter per home and made no attempt to restore reception to radio or portable television receivers;[11] (ii) eight of the 14 homes showed marked improvement in signal quality when the station was off the air;[12] (iii) measurement of the output power using the direct and indirect methods (*see* 47 C.F.R. § 73.267) gave two different results such that the station may have been operating at either 95% or 64% of authorized power;[13] (iv) neither the station's engineer nor the station manager were aware of the discrepancy or knew the exact power with which KOKS was operating;[14] (v) KOKS had been operating with a 7-bay directional antenna, rather than the 4-bay directional antenna currently authorized, since October of 1991, in violation of 47 C.F.R. § 73.1690(c);[15] (vi) the KOKS tower is lit with a beacon at the top and half levels and side-lamps at the 1/4 and 3/4 height levels, and thus is not in accordance with its authorization, which requires a top beacon and side-lamps at the 1/3 and 2/3 height levels; and (vii) the KOKS public file does not contain the quarterly problems/programs lists and lists of donors supporting station programming, as required by 47 C.F.R. §§ 73.3527(a)(7) and (8).

9. *The petitions to deny.* Section 309(d)(1) of the Communications Act requires a two-step analysis for judging the sufficiency of a petition to deny. We must first determine whether the petition and its supporting affidavits contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. 47 U.S.C. § 309(d)(1). In making this *prima facie* determination, we assume that the specific facts set forth by the complaining party are true without reference to contrary evidence, and we are limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). Allegations within these documents that consist "of ultimate, conclusionary facts or more general allegations on information and belief, supported by general affidavits...are not sufficient." *Gencom, Inc. v. FCC*, 832 F.2d 171, n.11 (D.C. Cir. 1987). If we determine that the petition satisfies the threshold standard, the inquiry proceeds to a second phase. The Commission must then determine whether, on the basis of the application, the pleadings filed, or other matters which it may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). Should the Commission conclude that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. § 309(e). *See* 47 U.S.C. § 309(d)(2).

10. We have examined the petitions to deny and supporting affidavits filed by Hillis and Smith to determine if they have established that the renewal of KOKS's license would be *prima facie* inconsistent with the public interest. The factual allegations, supported by numerous affidavits of persons with personal knowledge of such facts, are that there remains a widespread blanketing interference problem caused by KOKS and that the station has misrepresented to the Commission the success of its efforts to remedy that problem. We conclude that Hillis and Smith have established a *prima facie* case. While the issue of blanketing interference in the context of license renewal has never previously been before the Commission, we have denied license renewal applications of stations for willful and repeated technical violations. *Heart of the Black Hills Stations*, 32 FCC 2d 196 (1971) (violations "included...faulty tower lighting deficiencies, operation below authorized power, spurious emission [near an air traffic control frequency], [faulty] maintenance logs, and such serious deficiencies in the quality of picture transmission that they were virtually unviewable." *Id.* at 198). The Commission also has denied license renewal when technical violations have been combined with a misrepresentation or lack of candor. *Nick J. Chaconas*, 28 FCC 2d 231 (1971) (license renewal application denied for failure to perform transmission tests and subsequent falsification of transmission test logs), and *Lewel Broadcasting, Inc.*, 86 FCC 2d 896 (1981) (license renewal application denied due to failure to satisfy station operator requirements, failing to maintain adequate program/maintenance logs, falsifying log entries).

11. Having found that the Hillis and Smith petitions satisfy the threshold requirement of Section 309(d)(1), we must next determine, from all the evidence before us, including the reports from Calvary, the response of Hillis and Smith, and the FOB field report, whether substantial and material questions of fact are presented. Our analysis will focus upon two major concerns: technical violations and related misrepresentations.

12. *Blanketing violations.* The October *Order* and the Commission's Rules clearly defined KOKS' obligations with respect to the continuing blanketing interference being caused by the station: the station was to restore service to the 220 "Group A" complainants listed in the attachment to the *Order* within 120 days at no cost to the

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that of Mrs. Smith. A fifteenth selectee, Mike Pennington, was not visited by the FOB because he had moved since filing his complaint and no longer lived in the area.

[11] Calvary President Don Stewart stated that KOKS could not afford to install more than one filter at any one home, and that the station "would rather help a little at all of the homes than to limit assistance to just a few." FOB Field Report, at 4. Additionally, Mr. Stewart stated that he interpreted the reference to mobile receivers in the blanketing rule to include portable television sets.

[12] Of the six complainants whose signal was not affected by KOKS' being off the air, five had added filters or boosters at their own expense, and one had moved to a new residence.

[13] Operation at 64% of authorized power would minimize the blanketing problem during the field inspection and would violate the minimum transmitter output power requirements contained in 47 C.F.R. § 73.1560(b).

[14] The field report suggests that this discrepancy in measured output power may have been occurring over a substantial period of time and that reasonable scrutiny of the station's transmitter logs by station personnel would have revealed the disparity.

[15] Operation with a different directional antenna than that currently authorized could directly affect both the area and severity of blanketing interference. KOKS had earlier filed an application (BMLED-911009KD) seeking authorization to employ the 7-bay antenna, but installed and began operating with the 7-bay antenna without prior Commission approval. The application remains pending.

complainants. The station made 105 home visits, explaining that the remainder of the complainants listed in Group A "either said no to a home visit or said they did not have any interference or that they moved and no longer lived in the area. Others did not answer the two different letters sent...." KOKS' Final Report, at p.1. It is clear from the Hillis and Smith response and from the FOB field report that a substantial and material question of fact remains as to whether reception at each of the 105 Group A residences visited by KOKS has been fully restored at the station's expense. The FOB inspection found that the station installed a trap or filter in but one television in each household visited; it did not attempt to restore service to other televisions and radios. The President of Calvary stated to our field investigators that the station could not afford more than one filter per household. It thus appears that KOKS knowingly chose to limit its actions in meeting the requirements of the rule. KOKS also stated to the FOB investigators that it believed that it could exclude "portable" televisions as "mobile receivers" under Section 73.318. We find KOKS' belief in this regard to be unreasonable[16] and, in any event, of no exculpatory value because ignorance of the Commission's rules and requirements cannot excuse noncompliance. Furthermore, as the FOB field report concluded, the station is still adversely affecting broadcast service to many of the Group A complainants, as evidenced by the on/off tests conducted. Some of the complainants, in frustration, took steps (such as installing filters, boosters, or satellite dishes) at their own expense to improve reception. We do not believe KOKS was relieved of its financial obligation to restore service simply because some affected residents subsequently took remedial measures on their own.[17]

13. *Misrepresentation /lack of candor.* In correspondence to the Commission dated January 24, 1989, February 10, 1989, and September 22, 1989, as well as in its periodic reports filed pursuant to the October *Order,* KOKS has repeatedly stated that the reception of various complainants had been restored. For example, in its progress report dated February 11, 1991, KOKS states that "the [trap filter] has in all cases taken FM blanketing out of all TV sets that it has been installed on and in most cases restored channel 6 from Paducah, Kentucky." This statement appears to be untrue, as the installation of a filter at the homes visited by the FOB field inspector did not cure the blanketing interference experienced by those residents. Many of the representations concerning specific complainants were disputed by Hillis and Smith in their petitions to deny and their response to KOKS' final compliance report. As indicated above, it was from this contested group that the list of 14 complainants was compiled for on-site inspections by the FOB. The FOB field report supports the allegations of Hillis and Smith. At the homes visited, the FOB field inspector found that KOKS either had not restored television service, or had attempted restoration on only one television set per household; further, it did not attempt to restore FM radio service at all. Field Report, at 4. The FOB report concludes that "[t]he licensee of radio station KOKS did not comply with the requirements contained in 47 C.F.R. § 73.318, in that [it] did not restore the quality of viewing each complainant enjoyed prior to the station commencing operations." *Id.* at 8. At no time prior to the above on-site inspection did KOKS inform the Commission of three crucial facts: that it was installing one filter per household irrespective of the number of television receivers contained therein, that it was not even attempting to restore FM radio reception, and that it had altogether excluded portable televisions from consideration. Thus, KOKS' representations that these complaints had been resolved appear to be false or less than forthright.

14. Moreover, as indicated, KOKS had made explicit representations dating back to 1989 that the blanketing interference problems of many complainants had been resolved and that their blanketing problems had been cleared up.[18] Even accepting KOKS' erroneous view that reception need be restored to only one television set per household and that all portable receivers may be ignored, the FOB report strongly suggests that in at least 8 of the 14 homes visited, even the reception on the one television for which the blanketing interference had been assertedly cleared up by KOKS' efforts was not, in fact, restored.

15. As we stated in *Nick J. Chaconas,* 28 FCC 2d at 233:

> The Commission's ability to fulfill its statutory responsibilities in the area of radio and television broadcasting rests in considerable measure on its being able to rely upon each of those whom it licenses to observe conscientiously the Rules of the Commission and the applicable license terms and conditions. It is, likewise, fundamental to the regulatory process that the Commission be able to rely on the representations of those whom it licenses and those who come before it seeking licenses. Therefore, the Commission must demand candor from those who come before it and must refuse to tolerate deliberate misrepresentations. *WOKO, Inc.,* 329 U.S. 223 (1946); *WMOZ, Inc.,* 36 FCC 202 (1964), *aff'd* 3 FCC 2d 637 (1966).

We believe that the evidence before us is sufficient to raise a substantial and material question of fact regarding the truthfulness of KOKS' representations concerning the success and extent of its efforts to restore broadcasting service to the affected Poplar Bluff residents. We will therefore designate the KOKS license renewal application for an evidentiary hearing on appropriate issues specified below.

16. *Other rule violations.* Because we have determined that a hearing on the merits of the KOKS license renewal application is necessary, we believe that consideration of other matters raised in the petition and FOB field report, which by themselves would not warrant designation, is appropriate. As pointed out in the field report: (i) a discrepancy of some 30% exists regarding the exact power

[16] The "mobile receiver" exemption from the blanketing rule plainly does not apply to portable television sets. Rather, mobile receivers (such as car radios) are excluded due to their inherently transient nature. *See FM Blanketing,* 57 RR2d at 130; *cf. WLKX, Inc.,* 6 FCC Rcd 225, 227 (1991). While the Commission "[does] not expect licensees to replace cheap, hand-held radios with expensive FM tuners, ... we decline to... protect receivers of 'good design only.'" *FM Blanketing,* 57 RR 2d at 130.

[17] For example, while Section 73.318(b) excludes interference caused to booster amplifiers, a broadcaster's preexisting obligation to correct a blanketing problem is not obviated by a complainant's subsequent attempt to improve its own reception by purchasing a booster amplifier.

[18] The actual language used in the KOKS home visit statements was that reception on the various television channels was "coming in fine."

with which the station is operating, which discrepancy was unknown to station management; (ii) the station has been operating since October with a new directional antenna without the required Commission authorization; (iii) the station's tower is not lit in accordance with its construction permit; and (iv) the station's public file fails to contain the required community issues/programs lists and list of donors supporting station programming.

17. In sum, it appears that the operation of station KOKS may have been "conducted in an exceedingly careless, inept, and negligent manner, and the licensee is either incapable of correcting or unwilling to correct" these operating deficiencies. *Heart of the Black Hills Stations*, 32 FCC 2d at 198. Appropriate issues concerning KOKS' inept operation will therefore be specified.

18. Accordingly, IT IS ORDERED that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), the license renewal applicant IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Calvary Educational Broadcasting Network, Inc. violated Section 73.318 of Commission's Rules, 47 C. F. R § 73.318 ("FM blanketing interference"), and, if so, the nature and extent of this violation;

2. To determine, whether Calvary has misrepresented facts or lacked candor in its statements to the Commission regarding the extent and success of its efforts to correct the blanketing interference problems;

3. To determine whether the licensee's management and operation of Station KOKS was so negligent, careless, or inept, or evidenced such disregard for the Commission's rules, that it cannot be relied upon to fulfill the responsibilities imposed upon it;

4. To determine, in light of the evidence adduced pursuant to the preceding issues, whether or not grant of the subject license renewal application would serve the public interest, convenience and necessity.

19. IT IS FURTHER ORDERED that the petitions to deny filed by Hillis and Smith ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

20. IT IS FURTHER ORDERED that if it is determined that the hearing record does not warrant an Order denying the license renewal application of KOKS(FM), it shall also be determined if KOKS(FM) has willfully or repeatedly violated Sections 73.318 (FM Blanketing), 73.1015 (submitting truthful written statements and responses to the Commission), 73.267 (determining operating power), 73.1560 (operating power requirements), 73.1213 (tower lighting and painting), and 73.3527 (public file requirements) of the Commission's Rules. If so, it shall also be determined whether an Order for Forfeiture shall be issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, in the amount of up to $250,000 for the willful and repeated violation of the stated rules.

21. IT IS FURTHER ORDERED that, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended. The Commission has determined that, in every case designated for hearing involving revocation or denial of assignment, transfer, or renewal of license for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Accordingly, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of this case should be.

22. IT IS FURTHER ORDERED that, in accordance with Section 309(e) of the Communications Act of 1934, as amended, the burden of proceeding with the introduction of the evidence upon issues (1), (2), (3), and (4), and the burden of proof with respect to all issues, shall be upon the licensee, Calvary Educational Broadcasting Network, Inc.

23. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

24. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

25. IT IS FURTHER ORDERED that the Secretary send by Certified Mail-Return Receipt Requested, a copy of this Order to the applicant, to Jean Hillis, and to Doris Smith.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 11, 1992

COMMISSION PROPOSES RELIEVING LOCAL EXCHANGE CARRIERS OF REPORTING OBLIGATION FOR BILLING AND COLLECTION CONTRACTS

Pleading Cycle Established

COMMENTS: June 26, 1992
REPLY COMMENTS: July 13, 1992

In the Report and Order in CC Docket No. 85-88,102 FCC 2d 1150, *recon. denied,* 1 FCC Rcd 445 (1986), the Commission detariffed local exchange carrier (LEC) provision of billing and collection services for interstate communications effective January 1, 1987. In a subsequent Public Notice, the Commission directed LECs to identify, by letter addressed to the Common Carrier Bureau (Bureau), all currently executed contracts for such services, to update that initial letter when these contracts are terminated or newly executed, and, to send copies of all such correspondence to the Bureau's Tariff Division. *See* Local Exchange Carrier Filing of Billing and Collection Contracts Clarified, Public Notice, 2 FCC Rcd 809 (1987).

The Bureau has tentatively concluded that the LEC reporting requirements summarized above should be terminated. We base this conclusion on our finding that the burden on LECs of filing these reports does not appear to be justified by the benefit to the Commission or the public of having this information on file. The Bureau therefore proposes to eliminate these reporting requirements.

Interested parties may file comments regarding this proposal no later than **June 26, 1992**. Reply comments may be filed no later than **July 13, 1992**.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Allen A. Barna, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc.
Petition for Waiver of Part 69 of the
Commission's Rules

ORDER

Adopted: June 11, 1992; Released: June 15, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On August 1, 1991, US West Communications, Inc. (US West) filed a petition for waiver of Part 69 of the Commission's Rules to establish a new access rate element for Common Channel Signalling (CCS) Call Set-Up service.[1] Several pleadings have been filed in response to the US West waiver petition.[2] For the petition.

II. BACKGROUND

2. Part 69 of the Commission's Rules, 47 C.F.R. Part 69, prescribes the charges that local exchange carriers must establish for their access services. Sections 69.4 (b) and 69.106 require carriers to assess a Local Switching rate element, which is a per minute charge for the use of their local exchange switching facilities. In its waiver petition, US West seeks to establish a Local Switching rate subelement which would be a per-call charge for "CCS Call Set-Up." US West describes CCS Call Set-Up as the transport of signalling information between a LEC switch and an IXC switch which enables the two carriers to route an internetwork call. US West Waiver Petition at 6-7.

3. US West states that the new rate subelement will recover a portion of costs for "CCS central office hardware and software (in the end office or tandem), each signaling link between the central office and the STP [signal transfer point][3] and the STP switching fabric used for CCS Call Set-Up." *Id.* at 3, 19. The CCS Call Set-Up charge will be assessed in addition to the existing switched access minutes of use charges. *Id.* at 3-4. US West asserts that CCS Call Set-Up will provide faster and more efficient set-up of internetwork calls and will expand the range of available options. *Id.* at 11-14. US West claims that CCS Call Set-Up should be treated as a new service under local exchange carrier (LEC) price cap regulation, rather than a restructure of its existing switched access service requiring reductions in switched access charges. *Id.* at 8-14; US West Reply at 4-7.

III. DISCUSSION

4. US West argues, *inter alia*, that granting this waiver and permitting US West to assess a separate per-call charge for CCS Call Set-Up would serve the public interest and thereby satisfy the requirements of *WAIT Radio*. US West Petition at 22. US West asserts that if the petition is denied, US West's nonCCS access customers will suffer hardship since they will be forced to pay the same local Switching access rate as customers who use CCS Call Set-Up even though CCS Call Set-Up will reduce access minutes and thereby lower the customer's access bill. *Id.* US West further contends that the waiver is more consistent with the Commission's access charge plan objectives -- elimination of unreasonable discrimination and undue preferences among rates for interstate services, efficient use of the local network, and full and fair competition in the interexchange services market -- than the current rate structure. *Id.* at 23, *citing MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, *Third Report and Order*, 93 F.C.C. 2d 241, 251, 265-68 (1983). Finally, US West insists that failure to grant the requested waiver would undermine incentives to create new services under LEC price cap regulation. *Id.* at 27-28.

5. Opponents Ad Hoc and MCI argue that, pursuant to *WAIT Radio*, a waiver must be supported by a persuasive demonstration of good cause and assume the validity of the rule itself. Ad Hoc Opposition at 2-3, 6-10; MCI Opposition at 2-3. Ad Hoc further contends that US West has not demonstrated the undue hardship, inequity, inability to comply with the general rule or other like considerations that would demonstrate "good cause" and justify a waiver. Ad Hoc Opposition at 3-4. MCI asserts that instead

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[1] The waiver petition also sought to establish a Common Channel Signalling/Signalling System Seven (SS7) interconnection link. On October 4, 1991, the Bureau released Southwestern Bell Telephone Company, Petitions for Waiver of Part 69 of the Commission's Rules, DA 91-1258, 6 FCC Rcd 6095 (Com.Car.Bur. 1991) , wherein it established a rate structure for the CCS/SS7 interconnection link. On October 25, 1991, US West filed a Petition for Waiver, as amended on November 12, 1991, requesting the rate structure for CCS interconnection granted to SWB. On October 25, 1991, US West also filed a motion for partial withdrawal of that portion of its August 1, 1991, petition for waiver that concerns CCS Access Capability (CCSAC). The Bureau granted US West's October 25, 1991, waiver request and permitted US West to provide CCS interconnection to customers through US West Communications, Inc., Tariff F.C.C. No. 1, Transmittal Nos. 203 and 219, which became effective on January 1, 1992. *See* Local Exchange Carrier Line Information Database, 7 FCC Rcd 525 (Com.Car.Bur. 1991).

[2] On August 23, 1991, the following parties filed comments in support of the US West Waiver petition: Dial-Net; Entre Telecommunications Corporation; Independent Telecommunications Network, Inc.; International Communications Network; Rochester Telephone Corporation (Rochester); Southwestern Bell Telephone Company (SWB). On that same date, the following parties filed comments opposing the US West waiver petition: Ad Hoc Telecommunications Users Committee (Ad Hoc); Allnet Communication Services, Inc.; American Telephone and Telegraph Company; Competitive Telecommunications Association; MCI Telecommunications Corporation (MCI); Telecom West, Inc.; and US Sprint Communications Company Limited Partnership. On September 6, 1991, US West filed a reply in support of its waiver petition and MCI filed a reply responding to the arguments of SWB and Rochester.

[3] Signal Transfer Points are CCS switches that switch network control signals, referred to as CCS messages, between nodes (switches or data bases) connected to the CCS network. *See* US West Waiver Petition at Appendix A, p. 1.,

of assuming the validity of the rule and seeking a waiver based on its particular circumstances, US West essentially challenges the rule itself. MCI Opposition at 3.

6. Pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, the Commission may waive any provision of its rules or orders on its own motion or on petition "if good cause therefor is shown." "An applicant for waiver faces a high hurdle even at the starting gate. When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.[4] The Commission's duty to consider waiver requests "emphatically does not contemplate that the agency must or should tolerate evisceration of a rule by waivers."[5] In supporting its case for a waiver, an applicant must demonstrate that there are special circumstances that warrant a deviation from the rule and must show how such deviation will serve the public interest. [6] A showing of this nature can be undue hardship, inequity, inability to comply with the general rule or other like consideration, but must be substantial and unique to the applicant.[7] In *WAIT Radio*, the court explained that "[t]he very essence of waiver is the assumed validity of the general rule..."[8] Given the validity of the rule, *WAIT Radio* requires the party seeking the waiver to demonstrate that the rule is unjust as applied to the party given the unique circumstances of the situation.[9] The petitioner bears the burden of establishing this. We agree with MCI and Ad Hoc that US West has not satisfied the legal standard for a waiver. Specifically, US West has not demonstrated that there are special circumstances that warrant a deviation from the established Part 69 structure. As Ad Hoc notes, US West has not demonstrated how the circumstances that it faces are unique or differ from those faced by other carriers who are currently offering CCS service and its attendant features, including call set-up, as a non-chargeable optional feature available with Feature Group D access. Ad Hoc Opposition at 7-8. A waiver request should concede the validity of a rule. As MCI notes in its opposition, US West is challenging the rule itself which establishes a single, per minute charge to recover the costs of all LEC facilities used to deliver local switching, including those CCS facility costs assigned to Local Switching pursuant to Part 36 and 69 of the Commission's Rules. *See* MCI Opposition at 3. US West would prefer a rate structure that would recover CCS costs through a separate subelement within the Local Switching element, but has identified no circumstances unique to it that warrant a deviation from the existing rule. Because US West has failed to satisfy its burden, the Bureau hereby denies the carrier's request for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69.[10]

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's

Rules, 47 C.F.R. Part 69, filed by US West, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[4] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. den ied*, 409 U.S. 1027 (1972) (*WAIT Radio*). *See also Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*).

[5] *WAIT Radio v. FCC*, 418 F.2d at 1159.

[6] *Northeast Cellular*, 897 F.2d at 1166, *citing Industrial Broadcasting Co. v. F.C.C.* , 437 F.2d 680 (D.C. Cir. 1970) (indicating need for articulation of special circumstances beyond those considered during regular rulemaking).

[7] *WAIT Radio v. FCC*, 418 F.2d at 1159. *See also* Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, 5 FCC Rcd 6772 (Com.Car.Bur. 1990); National Exchange Carrier Association, Inc. Petition for Waiver, 3 FCC Rcd 6042, 6043 (Com.Car.Bur. 1988).

[8] *WAIT Radio*, 418 F.2d at 1158.

[9] *See Northeast Cellular*, 897 F.2d at 1166, *citing WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), and *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970).

[10] Because we deny US West's request for waiver of Part 69 on the grounds that it has not proffered the showing required under relevant precedent, we need not address the other issues raised by the various commenters. *Cf.* Bell Atlantic Telephone Companies, 4 FCC Rcd 7210 (Com.Car.Bur. 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 15, 1992

CC Docket No. 89-79
CC Docket No. 88-2

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON SOUTHWESTERN BELL PETITION FOR WAIVER OF ONA TARIFFING ORDERS

On June 11, 1992, Southwestern Bell filed a petition for waiver of the Commission's ONA tariffing orders in CC Docket Nos. 88-2 and 89-79, which require the BOCs to file federal tariffs for all of the basic service elements listed in their approved ONA plans. Southwestern Bell requests that it be permitted to refrain from tariffing Loop Status Verification Service (also called Detection of Break in Line Within 60 Seconds) and Traffic Data Accessible by ESP. Southwestern requests a waiver for Loop Status Verification, stating that it has lost its equipment supplier and that there is no industry standard for this service. Southwestern Bell also states that it has developed stand-alone Data Over Voice (DOV) service as a substitute, and DOV will be ready early next year. Southwestern seeks a waiver for Traffic Data, arguing that customers are dissatisfied with the service, and it plans to introduce Customer Network Administration, a superior form of the service, by early 1993.

Interested parties should file comments on the petition by **June 30, 1992**, and reply comments by **July 10, 1992**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Mark S. Nadel, Common Carrier Bureau, FCC, Room 544, 1919 M St., N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petitions can be obtained from the Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1216. For further information contact Mark Nadel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-6363.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 15, 1992

Ex Parte Presentations Relating to Requests for Pioneer's Preferences

Persons who may wish to make *ex parte* presentations supporting or opposing a request for a pioneer's preference are reminded that such a request is an adjudication under the Commission's *ex parte* rules. Thus, for example, a request for a pioneer's preference becomes a "restricted" proceeding after a formal opposition has been filed, and *ex parte* presentations are thereafter prohibited until the pioneer's preference request is no longer subject to reconsideration by the Commission or review by any court. Similarly, *ex parte* presentations are prohibited with respect to any application for an experimental authorization that has been formally opposed. Any related petition for Rule Making to allocate spectrum is an "exempt" proceeding under the *ex parte* rules and *ex parte* presentations with respect to such a petition are permissible. If a Notice of Proposed Rule Making to allocate spectrum is issued, the Rule Making proceeding is a "non-restricted" proceeding and *ex parte* presentations are permitted with respect to the Rule Making proceeding, provided they are disclosed. *See Report & Order, Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 FCC Rcd. 3488, 3493(¶ 42) & 3500 (n.9) (1991); 47 C.F.R. §§ 1.1202(d), 1.1204(a)(2), 1.1206, 1.1208.

In addition to this general guidance, the Commission has specifically indicated that certain pioneer's preference requests relating to low-earth orbit satellites, filed by Volunteers in Technical Assistance, Orbital Communications Corporation and STARSYS, Inc., are restricted and that *ex parte* presentations are prohibited. *See Tentative Decision, Request for Pioneer's Preference in Proceeding to Allocate Spectrum for Fixed and Mobile Satellite Service for Low-Earth Orbit Satellites*, 7 FCC Rcd 1625, 1628(¶ 20) (1992).

For further information contact Rodney Small, (202) 653-8116.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Robert L. Pettit
General Counsel

GC Docket No. 92-52

In the Matter of

Reexamination of the Policy	RM-7739
Statement on Comparative	RM-7740
Broadcast Hearings	RM-7741

ORDER

Adopted: June 11, 1992; Released: June 16, 1992

By the General Counsel:

1. On April 10, 1992, the Commission initiated a Rule Making proceeding to reexamine the criteria used to select among competing applicants for new broadcast facilities. *Reexamination of the Policy Statment on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992). Comments were filed June 2, 1992 and the reply date in this proceeding is currently June 22, 1992. *See Order*, FCC 92I-032 (May 11, 1992) (extending the procedural dates one week).

2. Now before the Commission is a Request for Extension of Time by the Association of America's Public Television Stations and National Public Radio (Public Broadcasters) filed June 9, 1992. Public Broadcasters request that the reply date be extended to July 3, 1992. In their pleading, Public Broadcasters assert that the specific issue of which criteria should apply to the selection of new noncommercial broadcast station permittees is of unique importance to them; however, their counsel will be participating in the annual public television membership meeting to be held outside of Washington, D.C. from June 20 to June 24, 1992. Public Broadcasters further assert that until that time, their staff will be occupied preparing for the meeting. Additionally, Public Broadcasters propose to discuss the issues in this proceeding at the annual meeting.

3. Under the Commission's rules, motions for extension of time are not routinely granted. 47 C.F.R. § 1.46(a). A relatively small number of the comments filed discuss the issue of particular importance to Public Broadcasters, and therefore we believe that the current reply date gives Public Broadcasters ample time to respond to them. Public Broadcasters have not shown special or unusual circumstances that would justify a further extension of time in this proceeding.

4. ACCORDINGLY, IT IS ORDERED, That pursuant to the authority delegated under 47 C.F.R. § 0.251 the Request for Extension of Time by the Association of America's Public Television Stations and National Public Radio filed June 9, 1992 IS DENIED.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-105

In the Matter of

The Use of N11 Codes and Other
Abbreviated Dialing Arrangements

ORDER

Adopted: June 15, 1992; Released: June 15, 1992

By the Deputy Chief, Common Carrier Bureau:

1. On June 12, 1992, the state regulatory commissions of Ohio, Indiana, New York and Wisconsin filed motions seeking a twenty-one day extension of the deadline for filing reply comments in this proceeding.[1] The state commissions request additional time because of the importance and complexity of the issues presented, and the concern that the impact makes upon the commissions ability to adhere to their respective mandates to serve the public interest.

2. Although it is the policy of the Commission that extensions of time shall not be routinely granted,[2] we believe, in light of the importance of the issues presented in this proceeding, that the public interest would be served by allowing the additional time requested by the state commissions for filing reply comments. Therefore, we grant the motions and extend the date for filing reply comments by an additional twenty-one days, until July 13, 1992.

3. Accordingly, IT IS ORDERED, pursuant to sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (j) and 155 (c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that the motions for further extension are GRANTED. The deadline for filing reply comments is extended to July 13, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

[1] This proceeding was initiated by a Notice of Proposed Rulemaking, released May 6, 1992.
[2] *See* 47 C.F.R. §1.46(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 11, 1992

COMMISSION REQUESTS ADDITIONAL COMMENTS IN PHASE II OF WESTERN UNION REMAND PROCEEDING

ACTION IN CC DOCKET NOS 78-97 PHASE II AND 82-122

Pleading Cycle Corrected

COMMENTS DUE: JUNE 19, 1992
REPLY COMMENTS DUE: JULY 6, 1992

On May 22, 1992, the Common Carrier Bureau (Bureau) released a Public Notice concerning the abovementioned proceedings.[1] To remove any uncertainties about filing dates established in the *Public Notice*, we restate them here, as corrected.

Carriers that are parties to CC Docket Nos. 78-97 Phase II or 82-122 are to file direct cases addressing the issues outlined in the *Public Notice* no later than **June 19, 1992**. Pleadings responding to the comments must be filed no later than **July 6, 1992**. This schedule provides carriers four weeks from the date of the *Public Notice* to file comments, and allows them more than two weeks to file replies if they wish to do so.

As we stated previously, comments are requested on the following issues: (1) whether the public rates that the Commission allowed to become effective for Western Union's telex and TWX facilities were appropriately applied to the Interconnected Carrier Parties[2] during the June 1982 to August 1984 period when interim prescription rates were in effect; (2) whether non-cost considerations justified lower rates for the ICPs than for the general public for the same services; (3) whether the Commission has authority to order reimbursements from the ICPs to Western Union for the June 1982 to August 1984 period; and (4) whether interest should be assessed on any amounts the ICPs may owe Western Union. Commenters may also supply additional information that they believe will aid the Commission's resolution of these issues. Commenters must explain how such information was derived and include a detailed explanation of the methodology used, including any accounting or statistical methods employed. Parties shall attach full copies of any relevant earlier pleadings from this proceeding to their comments, and shall cite to those pleadings wherever appropriate.

An original and four copies of all comments and replies must be filed with the Secretary of the Commission in accordance with Section 1.51(c) of the Commission's Rules. Parties must also furnish one copy of their comments and replies to Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington D.C. 20554, and six copies to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. For further information contact Debra Sabourin, Common Carrier Bureau, Tariff Division at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

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[1] Public Notice, CC Docket Nos. 78-97 and 82-122, DA 92-644, released May 22, 1992 (Com. Car. Bur) (*Public Notice*).

[2] The ICPs were ITT World Communications, Inc., TRT Telecommunications Corporation, Western Union International, Inc., RCA Global Communications, Inc., FTC Communications, Inc., Graphnet Inc., International Relay, Inc., and Consortium Communications International.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Gregory J. Vogt
Chief, Tariff Division,
Common Carrier Bureau

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal Nos. 16, 19,
F.C.C. Nos. 7 and 8	20, and 25

ORDER

Adopted: June 10, 1992; Released: June 11, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On May 7, 1992, AT&T Communications (AT&T) filed Contract Tariff Transmittal No. 16 which is scheduled to become effective June 21, 1992.[1] On May 21, 1992, AT&T filed Contract Tariff Transmittal No. 20 which is scheduled to become effective July 5, 1992. These transmittals were originally scheduled to become effective on 14 days' notice pursuant to the Commission's *IXC Order*.[2] That Order establishes streamlined tariff review for filings that are presumed lawful. These transmittals introduce Contract Tariff Nos. 7 and 8 for ACCUNET Spectrum of Digital Services and Local Channel Service.

2. MCI Telecommunications Corporation and Sprint Communications Company Limited Partnership both filed petitions to reject or, in the alternative, to suspend and investigate Contract Tariff Transmittal No. 16 on May 14, 1992, and Contract Tariff Transmittal 20 on May 28, 1992.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff Transmittal Nos. 16 and 20, and the petitions. We conclude that these filings do not warrant rejection because they do not, on their face, conflict with a statute or with an agency regulation or order. We further conclude that the petitions do not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or, in the alternative, to suspend and investigate AT&T Communications Contract Tariff F.C.C. Nos. 7 and 8, Transmittal Nos. 16 and 20, filed by MCI Telecommunications Corporation, and the petitions to reject or alternatively suspend and investigate AT&T Communications Contract Tariff F.C.C. Nos. 7 and 8, Transmittal Nos. 16 and 20, filed by Sprint Communications Company Limited Partnership, ARE DENIED.

5. IT IS FURTHER ORDERED that, for the purpose of advancing the effective date of these filings, Special Permission No. 92-408 is assigned and Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, & 61.59, ARE WAIVED. These revisions should be filed on not less than one day's notice.

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[1] Pursuant to Special Permission Nos. 92-343 and 92-384, AT&T filed Contract Tariff Transmittal Nos. 19 and 25 to modify Contract Tariff Transmittal 16 on May 20, 1992 and June 9, 1992, respectively.

[2] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part,* Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, FCC 92-181 (released Apr. 17, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-91

In the Matter of

Nevada Bell Transmittal Nos. 130, 132
Revisions to Tariff F.C.C. No. 1

Open Network Architecture Tariffs
of Bell Operating Companies

ORDER DESIGNATING SUPPLEMENTAL ISSUES FOR INVESTIGATION

Adopted: June 10, 1992; Released: June 10, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On April 16, 1992, the Common Carrier Bureau (Bureau) designated issues to be investigated with respect to initial Open Network Architecture (ONA) tariffs filed by the Bell Operating Companies (BOCs).[1] In this Order, we designate additional issues for investigation relating to tariff filings of Nevada Bell.

II. DISCUSSION

2. On March 13, 1992, Nevada Bell filed Transmittal No. 130, to offer a dedicated network access line (DNAL) as a basic serving arrangement (BSA) and two basic service elements (BSEs) available only with this BSA.[2] In addition, Nevada Bell intends to provide Direct Inward Dialing (DID) as a BSE.[3] This tariff revision is scheduled to take effect on June 11, 1992, on 90 days' notice. No petitions were filed against Transmittal No. 130.

3. Nevada Bell's BSAs and BSEs are Open Network Architecture (ONA) services. Nevada Bell provided cost support for the BSEs based on the Switching Cost Information System (SCIS), a computer model which quantifies the engineering processes of a switching offices in order to apportion switch capacity and cost among the features and functions the switch provides. Nevada Bell and other BOCs used SCIS to support their initial BSE rates. Thus, these BSEs raise issues similar to those raised by the ONA tariffs now under investigation pursuant to the *ONA Designation Order*, and accordingly, we suspend Transmittal 130 for one day and include these services in our ongoing ONA investigation.

III. SUPPLEMENTAL DESIGNATION ISSUES

4. Nevada Bell is directed to submit a supplemental direct case answering issues (2), (3), and (4), relating to the reasonableness of its BSE rates, as designated in the *ONA Designation Order* as they apply to the BSEs in Transmittal 130.[4] To the extent that BSEs tariffed in Transmittal 130 rely upon the same model office selection procedures and cost of money assumptions, Nevada Bell may incorporate by reference its answers to issue (2) and issue (3) included in its direct case filed on May 18, 1992. Issue (4) should be addressed in terms of the specific BSEs involved.

IV. PROCEDURAL MATTERS

A. Filing Schedules

5. This investigation will be conducted as a notice and comment proceeding. Nevada Bell is directed to respond to the issues described in this Order no later than **July 13, 1992**. This response should be captioned "Supplemental Direct Case. " The supplemental direct case must supply all information upon which Nevada Bell relies to support its positions (apart from the possible exceptions noted in para. 4, *supra)*. Parties responding to this direct case must caption their responses as "Opposition to Supplemental Direct Case" or "Comments on Supplemental Direct Case," and may be filed no later than **August 17, 1992**. Nevada Bell may file a "Rebuttal" to oppositions or comments no later than **September 15, 1992.**

6. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, Downtown Copy Center, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919

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[1] Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, 7 FCC Rcd 2604 (Com.Car.Bur. 1992) (*ONA Designation Order).*

[2] The two BSEs are Verify Integrity of Subscriber Lines and Availability and Stop Hunting Control Arrangement. Nevada Bell, Transmittal No. 130, Description and Justification (D&J) at 6-7. The Common Carrier Bureau (Bureau) earlier granted Nevada Bell a waiver to offer the DNAL as a BSA. Pacific Bell and Nevada Bell, Petitions for Waiver of Part 69 of the Commission's Rules, Dedicated Network Access Lines, Open Network Architecture, 7 FCC Rcd 1933 (Com.Car.Bur. 1992) (*Pacific Bell DNAL/PBX Order).*

[3] Nevada Bell also offered DID Trunk Queuing as a BSE, but later filed a petition for waiver of the requirement that BOCs file tariffs for all BSEs in their ONA plans, including the DID Trunk Queuing BSE. *See* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 6 FCC Rcd 7646, 7653 (1991); Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket Nos. 89-79, 88-2, 7 FCC Rcd 811 (Com.Car.Bur. 1992). That waiver petition is still pending.

[4] Issue (1) is directed to carriers developing unit investment for BSEs on the basis of the (short run) marginal investment option of SCIS and SCM. As Nevada Bell develops unit investment for the BSEs in Transmittal 130 using the average basis assumption within the SCIS model, issue (1) is not applicable to Nevada Bell in this case.

M Street, N.W., Room 222, Washington, D.C. 20554. Such comments should specify the docket number of this investigation.

7. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

B. Ex Parte Requirements

8. *Ex parte* contacts (*i.e.*, written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until the commencement of the Sunshine Agenda period. The Sunshine Agenda period terminates when a final Order is released and the final Order itself is issued. Written *ex parte* contacts and memoranda summarizing oral *ex parte* contacts must be filed on the day of the presentation with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. §§ 1.1200 *et seq.*

C. Paperwork Reduction Act

9. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions contained in Nevada Bell Transmittal Nos. 130 and 132[5] ARE SUSPENDED for one day and an investigation of the referenced tariff transmittals, and any future tariff revisions modifying those Transmittals, IS INSTITUTED.

11. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 203(c), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), 205, and 403, that the issues set forth in this Order ARE DESIGNATED FOR INVESTIGATION.

12. IT IS FURTHER ORDERED that Nevada Bell SHALL FILE tariff revisions reflecting this suspension no later than 10 days from the release date of this Order. For these purposes, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, and assign Special Permission No. 92-388.

13. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Nevada Bell shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

14. IT IS FURTHER ORDERED that Nevada Bell and Pacific Bell shall include a response to each item of information requested in Section III of this Order in its direct case.

15. IT IS FURTHER ORDERED that this Order shall become effective on the date of its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[5] On April 27, 1992, Nevada Bell filed Transmittal No. 132, to defer Transmittal 130 to June 11, and make minor textual corrections.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal No. 23
F.C.C. No. 10	

ORDER

Adopted: June 15, 1992; Released: June 15, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 2, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective June 16, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 10 for AT&T Pro WATS Service.

2. On June 9, 1992 MCI Telecommunications Corporation and Sprint Communications Company Limited Partnership filed petitions to reject or, in the alternative, suspend and investigate Contract Tariff Transmittal No. 23.

3. The Common Carrier Bureau has reviewed AT&T Contract Tariff Transmittal No. 23 and the relevant pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or, in the alternative, suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 10, Contract Tariff Transmittal No. 23 filed by MCI Telecommunications Corporation and Sprint Communications Company Limited Partnership ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, FCC 92-181 (released Apr. 17, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WORLD COMMUNICATIONS, INC. File No. I-T-C-92-117

Application for authority to acquire and operate facilities for service between the U.S. and Lithuania.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 16, 1992; Released: June 25, 1992

By the Chief, International Facilities Division:

1. The above-captioned application, filed by World Communications, Inc. (WorldCom), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide international services between the U.S. and Lithuania. The applications was placed on public notice on March 11, 1992. No comments were received.

2. WorldCom is a wholly-owned subsidiary of Tele-Columbus USA, Inc., a Delaware corporation, which inturn in a wholly-owned subsidiary of Tele-Columbus AG, which iteself is a wholly-owned subsidiary of Motor Columbus AG. Tele-Columbus AG and Motor-Columbus AG are entities organized under the laws of Switzerland. WorldCom is a foreign-owned carrier under the Commission's *International Competitive Carrier* policies, 102 F.C.C. 2d 812, 842 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986), and is dominant in its provision of international common carrier services between U.S. and international points. *See Western Union Corporation and World Communications, Inc.*, 4 FCC Rcd 2219 (Com. Car. Bur. 1989).

3. As a dominant carrier in its provision of international common carrier services, WorldCom remains subject to traditional facilities authorization requirements and rate regulation. WorldCom is currently authorized to provide international telecommunication services between the U.S. and various overseas points. WorldCom is now seeking authority to provide international services between the U.S. and Lithuania.

4. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and the Lithuania by WorldCom.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-92-117 IS GRANTED, and WorldCom is authorized to:

a. lease from Comsat and operate 30 64-kbps satellite circuits between the New York Teleport earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Lithuania furnished by WorldCom's correspondent in Lithuania;

b. lease and operate 30 64-kbps circuits in the New York Teleport earth station to be used in conjunction with the satellite space segment;

c. lease and operate 30 64-kbps connecting circuits between the New York Teleport earth station and WorldCom's New York City operating center; and

d. use said facilities to provide WorldCom's regularly authorized services between the U.S. and Lithuania.

6. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

7. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between WorldCom or its parent/affiliate and its correspondent in Lithuania, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

8. IT IS FURTHER ORDERED that the WorldCom shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

9. IT IS FURTHER ORDERED that the WorldCom shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

10. IT IS FURTHER ORDERED that WorldCom shall file quarterly reports of revenue, number of messages, and number of minutes of originating and terminating traffic for all countries individually within 90 days from the end of each calendar quarter.

11. IT IS FURTHER ORDERED that WorldCom shall file additional Section 214 application to supplement existing facilities for service to any overseas points it is authorized to serve.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRANSPACIFIC TELECOMMUNICATIONS, INC. File No. I-T-C-92-123

Application for authority to operate as an international resale carrier.

TELECOIN COMMUNICATIONS, LTD File No. I-T-C-92-126

Application for authority to operate as an international resale carrier.

COMMUNICATION SERVICE OF AMERICA, INC. File No. I-T-C-92-128

Application for authority to operate as an international resale carrier.

SHARED COMMUNICATIONS SERVICES, INC. File No. I-T-C-92-129

Application for authority to operate as an international resale carrier.

U S COMMUNICATIONS, INC. File No. I-T-C-92-130

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 16, 1992; Released: June 25, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public on a resale basis by Transpacific Telecommunications, Inc. (TTI), TeleCoin Communications, Ltd. (TeleCoin), Communication Service of America, Inc. (CSA), Shared Communications Services, Inc. (SCSI) and U S Communications, Inc. (USCI).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-123, I-T-C-92-126, I-T-C-92-128, I-T-C-92-129 and I-T-C-92-130 ARE GRANTED; and

a. TTI is authorized to provide international switched voice service by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2 and Fox Communications' Tariff F.C.C. Nos. 1 between the U.S. and the international points listed in those tariffs;

b. TeleCoin is authorized to provide international switched voice service by the resale of the international switched voice service set forth in MCI's Tariff F.C.C. No. 1 and Intellicall Operator Services Inc.'s Tariff F.C.C. No. 1 between the U.S. and the international points listed in those tariffs;

c. CSA and USCI are authorized to provide international switched voice service by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the U.S. and the international points listed in those tariffs; and

d. SCSI is authorized to provide international switched service by the resale of the international switched voice service set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 between the U.S. and the international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CORPORATE SATELLITE COMMUNICATIONS, INC. File No. I-T-C-92-055

Application for authority to establish channels of communication between the U.S. and INTELSAT Satellites for the provision of INTELSAT Business Services.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 16, 1992; Released: June 25, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of INTELSAT Business Services (IBS) to the general public by Corporate Satellite Communications, Inc. (CSC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-055 IS GRANTED, and CSC is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT satellites for the provision of IBS and related digital video services between the U.S. and international points listed in Comsat's Tariff F.C.C. No. 103 for the space segment component of IBS and related digital video services.

3. IT IS FURTHER ORDERED that the authority granted herein for CSC to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

4. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

5. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between CSC and its correspondents, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

METROPOLITAN COMMUNICATIONS, INC. File No. I-T-C-92-118

Application for authority to operate as an international resale carrier.

ACC LONG DISTANCE OF ILLINOIS, CORP. File No. I-T-C-92-131

Application for authority to operate as an international resale carrier.

US TELEDATA CORP. File No. I-T-C-92-133

Application for authority to operate as an international resale carrier.

ATX TELECOMMUNICATIONS SERVICES File No. I-T-C-92-135

Application for authority to operate as an international resale carrier.

ACC LONG DISTANCE OF OHIO CORP. File No. I-T-C-92-138

Application for authority to operate as an international resale carrier.

ACC LONG DISTANCE OF MASSACHUSETTS CORP. File No. I-T-C-92-139

Application for authority to operate as an international resale carrier.

EXECUTONE INFORMATION SYSTEMS, INC. File No. I-T-C-92-142

Application for authority to operate as an international resale carrier.

QUEST COMMUNICATIONS CORP. File No. I-T-C-92-143

Application for authority to operate as an international resale carrier.

CONNECT AMERICA COMMUNICATIONS, INC. File No. I-T-C-92-149

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 16, 1992; Released: June 26, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public on a resale basis by Metropolitan Communications, Inc. (Metropolitan), ACC Long Distance of Illinois Corp. (ACC-Illinois), US TeleData Corp. (USTD), ATX Telecommunications Services (ATX), ACC Long Distance of Ohio Corp. (ACC-Ohio), ACC Long Distance of Massachusetts (ACC-Mass.), Executone Information Systems, Inc. (Executone), Quest Communications Corp. (Quest), and Connect America Communications, Inc. (Connect America).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-118, I-T-C-92-131, I-T-C-92-133, I-T-C-92-135, I-T-C-92-138, I-T-C-92-139, I-T-C-92-142, I-T-C-92-143 and I-T-C-92-149 ARE GRANTED; and

a. Metropolitan and Quest are authorized to provide international switched voice service by the resale of the international switched voice service set forth in MCI's Tariff F.C.C. No. 1 between the U.S. and international points listed in that tariff;

b. ACC-Illinois, ACC-Ohio and ACC-Mass. are authorized to provide international switched voice and facsimile services by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1, 2 and 12, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and international points listed in those tariffs;

c. USTD is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2 and ATC's Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs;

d. Executone and Connect America are authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs; and

e. ATX is authorized to provide international switched voice and data services by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff

F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE FLORIDA TELEPORT LIMITED — File No. ITC-92-102

For Authority Pursuant to Section 214 of the Communications Act of 1934 to Establish Channels of Communication between the U.S. and the Pan American Satellite System for the provision of International Communications Services

ORDER AND AUTHORIZATION

Adopted: June 16, 1992; Released: June 25, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international private line services including private line voice and data services between the U.S. and overseas points via the Pan American Satellite (PAS) system by The Florida Teleport Limited (Teleport).[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-102 IS GRANTED, and Teleport is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and the PAS-1 satellite for the provision of service not interconnected with the public switched network, including private line service, between the U.S. and those countries listed in Appendix A, which PAS is authorized to service, not to exceed one (1) T-1 circuit to each country.

3. IT IS FURTHER ORDERED that Teleport is restricted in its communications with PAS-1 satellite to the provision of capacity through the sale or lease of transponder capacity for communications not interconnected with the public switched message networks (except for emergency restoration services).

4. IT IS FURTHER ORDERED that the authorization to use the PAS-1 satellite is subject to Commission jurisdiction over the use of all space segment within the PAS system to ensure compliance with the restrictions placed on the operation of separate satellite systems.

5. IT IS FURTHER ORDERED that the authority granted herein for Teleport to establish channels of communication between the earth stations in the U.S. and the PAS-1 does not dispense with the requirement that all such earth stations must be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

6. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

7. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Teleport and its correspondents, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

8. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

10. IT IS FURTHER ORDERED that the applicant shall file separate Section 214 applications to acquire any additional circuits over the PAS-1 system.[2]

11. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of this Order's public notice date (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Argentina
Barbados
Bolivia
Brazil
Chile
Columbia
Costa Rica
Dominican Republic
Equador
Guatemala
Honduras
Peru
Panama

FOOTNOTES

[1] Teleport, a partnership organized under the laws of the State of Florida, is an authorized common carrier subject to Section 214 of the Communications Act of 1934, as amended.

[2] In *International Competitive Carrier*, 102 F.C.C. 2d 812 (1985), the Commission decided not to apply streamlined Section 214 procedures to non-dominant international carrier acquisition of private cable or separate satellite facilities. *Id.* at 845.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERNATIONAL TELECOMMUNCATIONS CORPORATION — File No. ITC-92-105

For Authority Pursuant to Section 214 of the Communications Act of 1934 to Establish Channels of Communication between the U.S. and INTELSAT Atlantic and Pacific Satellites for the Provision of INTELSAT Business Service and International Television Service

ORDER AND AUTHORIZATION

Adopted: June 16, 1992; Released: June 25, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the provision of INTELSAT Business services (IBS) and International Television Service by International Telecommunications Corporation (ITC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-105 IS GRANTED, and ITC is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of IBS and International Television Service between the U.S. and countries listed in Comsat's Tariff F.C.C. No. 103 for the space segment of IBS and International Television Service.

3. IT IS FURTHER ORDERED that the authority granted herein for ITC to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

4. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

5. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between ITC and its correspondents, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of this Order's public notice date (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MOBILE TELECOMMUNICATIONS TECHNOLOGIES CORPORATION — MSD-90-12

Request for a Declaratory Ruling Concerning Preemption of State Regulation for Nationwide and Multistate Paging Service on Frequency 931.4375 MHz

and

U.S. CENTRAL, INC. — MSD-90-3

Petition for Declaratory Ruling on the Need to Preempt State Entry Regulation for Interstate Radio Common Carrier Service

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1992; Released: June 25, 1992

By the Commission:

I. INTRODUCTION

1. Before the Commission is a joint Application For Review of the *Memorandum Opinion and Order (Order)* of the Chief, Common Carrier Bureau (Bureau), 6 FCC Rcd 1938 (Com. Car. Bur. 1991), filed by the People of the State of California and the Public Utilities Commission of the State of California (California). California asks that the Commission reverse and vacate the Bureau's declaratory ruling that the nationwide and multistate wide-area paging service proposed by Mobile Telecommunications Technologies Corporation (MTel) on frequency 931.4375 MHz is subject solely to regulation by this Commission. The Bureau also determined that the Commission's rules do not limit use of frequency 931.4375 MHz and that MTel could use the frequency for nationwide paging service without requesting a waiver of the Commission's rules or submitting a petition for rulemaking.[1] MTel opposes the application for review and California submitted a reply to the opposition. For the reasons stated below, we deny California's application for review and preempt state entry, technical and rate regulation of MTel's integration of proposed nationwide and multi-state wide-area paging service on frequency 931.4375 MHz into its existing nationwide paging network on frequency 931.9375 MHz.

II. BACKGROUND

2. In the early 1980s, the Commission allocated three frequencies, including 931.9375 MHz, for the exclusive use of nationwide paging service.[2] In order to achieve nationwide coverage and ensure the viability of this new service, the Commission in 1983 preempted state regulation over entry requirements and technical standards for both network organizers and operators of nationwide paging systems and state rate regulation for network organizers.[3] The United States Court of Appeals for the District of Columbia Circuit affirmed that preemptive action. In 1984, the Commission preempted state rate regulation for network operators of nationwide paging systems, as well.[4]

3. MTel, one of the three original licensees of nationwide paging service, currently provides such service on the designated nationwide frequency 931.9375 MHz. In its *Order*, the Bureau determined that MTel could integrate its proposed service on frequency 931.4375 MHz with its existing nationwide paging service on frequency 931.9375 MHz to expand its overall, nationwide service.[5] MTel stated that it needed additional spectrum to continue to add new customers without causing degradation in its service quality. It contended that it could not develop new types of service, like alphanumeric paging, without additional spectrum to supplement its nationwide paging service. With respect to MTel's request, the Bureau found that the Commission's rules did not limit use of frequency 931.4375 MHz exclusively for local paging nor did the rules prohibit use of the frequency for nationwide paging service. Although the Bureau recognized that a page potentially could originate and terminate in the same state over MTel's nationwide paging system, the Bureau concluded that MTel's system does not permit the carrier to ascertain when or how frequently such intrastate pages may occur. Based on these facts, the Bureau found that the proposed service is interstate in nature, part of a nationwide paging service, and subject exclusively to federal jurisdiction.

III. CONTENTIONS

4. In its application for review, California argues that the Bureau's *Order* fails to meet the standards for federal preemption established by the United States Supreme Court in *Louisiana PSC v. FCC*, 476 U.S. 355 (1986). California states that, under that standard, the Commission can preempt state regulation only where it is not possible to separate intrastate from interstate services and where state authority over intrastate services would negate the exercise by the Commission of its own lawful authority over interstate services, citing *California v. FCC*, 905 F. 2d 1217, 1243 (9th Cir. 1990), and *NARUC v. FCC*, 880 F.2d 422, 428 (D.C. Cir. 1989). According to California, under this "impossibility exception" to Section 152(b) of the Communications Act of 1934, as amended, the Commission bears the burden of showing that all possible forms of a particular type of state regulation would negate the lawful exercise of federal authority over interstate service. Without this showing, it argues, the Commission may not use its preemptive powers. California contends that by preempting *any* state regulations that would impede the provision of MTel's interstate paging service, the Bureau did not follow the principles outlined in *Louisiana PSC*.

5. California asserts that the Bureau accepted at face value MTel's assertion that its system does not allow it to distinguish between its interstate and intrastate paging services, despite prior statements that MTel has made to the Commission that it could make such a distinction. In addition, California contends that even if the impossibility exception were to apply the Bureau has failed to identify "with some specificity" a particular type of state regulation

which would negate federal authority over interstate services. Thus, it concludes that the Bureau's *Order* does not meet the standards necessary to justify federal preemption.

6. In its opposition, MTel states that California has mistaken its current multistate and nationwide paging offering for "home market paging" services that MTel's corporate predecessor described to this Commission several years ago.[6] MTel states that other parties made the same incorrect assertions as California in response to MTel's Petition for Declaratory Ruling. There, the parties claimed that MTel's plan was the same as a 1987 proposal by Mobile Communications Corporation of America (MCCA) for interstate and intrastate paging. MTel argues that, in its application for review, California raises the same mistaken comparisons between MCCA and MTel. Moreover, MTel maintains that California has not provided any evidence that disputes the interstate nature of MTel's nationwide paging service or that the Commission has the authority to preempt state regulation of purely interstate offerings. It argues that the cases on which California relies all expressly preserve the Commission's considerable latitude to preempt state regulation of interstate services. Mtel asserts that the *Order* is valid here because the intrastate and interstate elements of the service are indistinguishable. MTel urges the Commission to dismiss the application for review and sustain the Bureau's *Order*.[7]

IV. DISCUSSION

7. The service on frequency 931.4375 that MTel proposes to integrate into its existing nationwide paging network, as well as that provided by its existing nationwide paging network, is primarily interstate in nature. MTel's system is intended to provide predominantly interstate paging service, and California does not suggest otherwise. Nevertheless, although MTel does not contemplate offering intrastate paging service over its integrated facilities, its nationwide paging service does permit the origination and termination of some incidental intrastate traffic. Since MTel's service potentially contains an intrastate component, however incidental and unintended, we therefore must determine whether federal preemption of state authority over the minimal intrastate component of MTel's service is permissible and warranted in these circumstances.

8. The Commission may preempt state regulation of intrastate service when "it is *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation." *Louisiana PSC v. FCC*, 476 U.S. at 375 n.4 (emphasis in original). In construing the "inseparability doctrine" recognized by the Supeme Court in *Louisiana PSC*, other federal courts of appeal have held that the Commission must show that state regulation over intrastate service thwarts or impedes the Commission's exercise of its lawful authority over interstate communications service. *See NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989); *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *Public Utility Com' n of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

9. We believe our preemptive action herein meets these standards. The record supports the Bureau's conclusion that MTel's system cannot distinguish between interstate and intrastate traffic. California's claim that MTel's service can be separated into intrastate and interstate components is based on incorrect factual assumptions regarding a different "home market paging" service. Since, based on the record before us, it is not possible to distinguish any potential intrastate traffic from the interstate traffic carried over MTel's system, it is not possible to separate intrastate and interstate regulatory components in these circumstances. *See Louisiana PSC*, 476 U.S. at 375 n.4.

10. Moreover, state regulation over the minimal intrastate component of MTel's service will thwart and impede the achievement of a valid, longstanding federal goal that is furthered by MTel's integration of a new frequency into its existing network -- the establishment and development of a thriving paging service that can provide coverage throughout the nation. In this regard, the rationale advanced by the Commission concerning preemption in the *Nationwide Paging* orders applies with equal force to MTel's integration of its proposed service on frequency 931.4375 MHz with its existing nationwide paging service on frequency 931.9375 MHz.[8] Preemption of state entry regulation is essential to prevent individual states from prohibiting or restricting access to MTel's integrated, nationwide system by operators within individual state borders or in particular cities, thereby thwarting the completion of a paging service capable of providing coverage throughout the nation.[9] Similarly, differing state technical standards for the service would subject nationwide operators such as MTel to confusing and conflicting network technical standards, thereby frustrating the nationwide plan.[10] Finally, state rate regulation cannot coexist with the federal scheme in these circumstances and must be preempted. Since it is technically and practically impossible to separate intrastate and interstate communications offered over nationwide paging systems for tariff purposes, any assertion of state rate regulation necessarily would negate the established federal policy toward rate regulation for this service.[11] Thus, state regulation over entry requirements, technical standards or rates for what is predominately an interstate service would necessarily thwart or impede the valid federal objective of achieving a truly nationwide paging service.

11. We conclude that our action herein meets applicable judicial standards for preemption, and we reject California's contrary assertion. Accordingly, we deny California's application for review and preempt state entry, technical and rate regulation of MTel's integration of proposed nationwide and multi-state wide-area paging service on frequency 931.4375 into its existing nationwide paging network on frequency 931.9375 MHz.

V. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, that the Application for Review filed by the People of the State of California and the Public Utilities Commission of the State of California, IS DENIED and that state regulation of the proposed system of Mobile Telecommunications Technology Corporation is preempted to the extent set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Bureau did not rule on U.S. Central's request for declaratory ruling that federal law preempts authority over any state entry regulations that apply to carriers providing only interstate paging service over facilities used for local paging, because it did not provide particular factual circumstances upon which the Bureau could make a determination.

[2] *See* Amendment of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, 89 FCC 2d 1337 (1982) (*First Report and Order), recon.*, 93 FCC 2d 908 (1983) (*Reconsideration Order (Part 2)*), *aff'd sub nom. NARUC v. FCC*, No. 83-1485 (D.C. Cir. Jan. 17, 1984) (mem.); 97 FCC 2d 900 (1984) (*Third Report and Order)* ; (collectively, " *Nationwide Paging* orders"). Twenty-seven other 900 MHz frequencies are allocated to one-way paging service.

[3] *Reconsideration Order (Part 2)*, 93 FCC 2d at 919-922.

[4] *Third Report and Order*, 97 FCC 2d at 908-9.

[5] MTel has Commission authorization to provide paging service on frequency 931.4375 MHz in a substantial number of cities. All traffic will be transmitted on a simulcast basis and routed via interstate 800 service to the same switch now serving the nationwide simulcast system. The traffic will then be distributed to transmitters in a number of states. Because of its configuration, the system cannot know where the recipient of a transmitted page is located.

[6] MTel refers to National Satellite Paging, Inc., 2 FCC Rcd 3185 (1987).

[7] The National Association of Regulatory Utility Commissioners (NARUC) submitted reply comments to MTel's opposition pursuant to Section 1.115(d) of the Commission's rules. Although NARUC's comments are not reply comments within the meaning of Section 1.115(d), we will consider their arguments in the exercise of our discretion. NARUC argues that the *Order* does not adequately explain how state regulation of MTel's service would thwart or impede the Commission's goals. NARUC also suggests, as it did before the Bureau, that the use of a local paging frequency for a nationwide paging service represents a deviation from the Commission's rules and constitutes a *de facto* reallocation of spectrum. For reasons discussed in Section IV, *infra*, we have concluded that state regulation of MTel's proposed service with respect to entry, technical standards and rates will thwart and impede valid federal objectives. Further, as the Bureau correctly noted, the use of frequency 931.4375 MHz for nationwide paging is not a reallocation of the frequency, because Commission rules do not limit use of the frequency to local paging, nor do the rules prohibit use of the frequency for nationwide paging service.

[8] MTel's existing nationwide paging service on frequency 931.9375, of course, is not subject to state entry requirements, technical standards or rate regulation due to the Commission's preemptive decisions in the *Nationwide Paging* orders. We note that the *Nationwide Paging* orders did not preempt all conceivable state regulation but only that which concerns entry, technical standards and rates. Our preemption here is similarly limited.

[9] *See Reconsideration Order (Part 2)*, 93 FCC 2d at 921.

[10] *See id. Cf. City of New York v. FCC*, 486U.S. 57 (1988) (upholding FCC preemption of state regulation concerning technical standards governing the quality of cable television signals).

[11] *See Reconsideration Order (Part 2)*, 93 FCC 2d at 921-22; *Third Report and Order*, 97 FCC 2d at 908-9.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SATCOM COMMUNICATIONS, INC. File No. ITC-92-125

For Authority Pursuant to Section 214 of the Communications Act of 1934 to Establish Channels of Communication between the U.S. and the countries of the former U.S.S.R. via INTELSAT Atlantic Ocean Region Satellites for the Provision of Switched and Private Line Services

ORDER AND AUTHORIZATION

Adopted: June 16, 1992; Released: June 25, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the provision of public switched services (PSN) and private line services by Satcom Communications Inc. (SATCOM).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-125 IS GRANTED, and SATCOM is authorized to establish the circuits listed in Appendix A, between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) satellites for the provision of PSN and private line services, including International Television Service, International Business Service, International Data Rate Service and DataNet Service, between the U.S. and the countries listed in Appendix A.

3. IT IS FURTHER ORDERED that the authority granted herein for SATCOM to establish channels of communication between the earth stations in the U.S. and the INTELSAT AOR satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

4. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

5. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between SATCOM and its correspondents, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports required by Section 63.10 of the Commission's Rules, 47 C.F.R. §63.10.

9. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of this Order's public notice date (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Country	No. of 64-kbps Circuits
Armenia	10
Azerbiajan	10
Byelarus	10
Kazakhstan	10
Kyrgycstan	10
Moldova Republic	10
Russian Republic	20
Tajikistan	10
Turkmenistan	10
Ukraine	10
Uzbekistan	10
Georgia	10
Latvia	10
Estonia	10
Lithuania	10

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-338

In re Applications of

ARTICHOKE BROADCASTING CORPORATION	File No. BPH-860917MG
CRYSTAL COMMUNICATIONS, INC.	File No. BPH-860918NZ
JULIO A. VILLAMIL, MARIA ELENA VILLAMIL, LAWRENCE M. WRATHALL AND NAYEREH E. WRATHALL d/b/a VILLAMIL FM RADIO	File No. BPH-860911OL
CALIFORNIA COMMUNITY TELEVISION NETWORK	File No. BPH-860911OO

For Construction Permit for a New
Commercial FM Station
Salinas, California

Appearances

Seymour M. Chase, Esq. on behalf of Artichoke Broadcasting Corporation; *Kathryn R. Schmeltzer, Esq.* on behalf of Crystal Communications, Inc.; *Christopher D. Imlay, Esq.* on behalf of Villamil FM Radio; *Dennis J. Kelley, Esq.* on behalf of California Community Television Network and *James W. Shook, Esq.* on behalf of the Chief, Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: June 17, 1992; Released: June 26, 1992

I. INTRODUCTION

1. By its *Memorandum Opinion and Order* released on March 12, 1990 (FCC 90R-15), the Review Board remanded this case to the Presiding Judge for resolution of the following issue:

> a) To determine whether Salinas Broadcasting Limited Partnership, Artichoke Broadcasting Corporation, Southern California Broadcasting Company, Crystal Communications, Inc., and California Community Television Network have a reasonable assurance of obtaining permission from the appropriate local authority for the construction of their proposed towers, antenna systems, and transmitter buildings at the Buena Vista site specified in their applications.

The Review Board assigned the burden of proceeding with the introduction of evidence to Villamil FM Radio, and the burden of proof to each of the named applicants with regard to its own proposal. Each of the applicants named in the specified issue (except for Southern California Broadcasting Company, which voluntarily dismissed its application, *Order*, FCC 90M-2420, released August 7, 1990) sought to meet the issue by amending its site proposal. California Community, Crystal and Salinas Broadcasting[1] each elected to remain at the Buena Vista site but with a reduction in proposed tower height. Artichoke elected to move to a new site with a reduction of its proposed tower height. Finally, Villamil, finding that the site which it had specified in its application had become unavailable, amended its application to propose a new site.

II. FINDINGS OF FACT

The Site Issue

2. At the hearing, Villamil shed its burden of proceeding with the introduction of evidence respecting California Community, Crystal and Salinas Broadcasting by offering a stipulation that "the transmitter site availability issue should be resolved in favor of" those three applicants. That stipulation, as presented by counsel for Villamil and as accepted by the Presiding Judge, is precisely[2] as follows:

> ". . . the stipulation would be that there is no -- that there is no issue with respect to the amended, i.e., current, transmitter sites of any of Crystal, CCTN and/or SBLP's applications, and that the transmitter site availability issue should be resolved in their favor, in favor of each of those three applicants."

California Community presented no evidence in the case. Crystal and Salinas Broadcasting jointly tendered three exhibits but, at the hearing, announced that "in view of the stipulation, Your Honor, we are not offering the Salinas and Crystal exhibits." Tr. 1179

3. For its burden of proceeding against Artichoke, Villamil presented its Exhibits 8 and 9, letters from Marc J. Del Piero, a member of the Monterey County Board of Supervisors, and Lynne H. Mounday, a Supervising Planner in the Monterey County Planning and Building Inspection Department. That evidence purports to show that Artichoke's site, as depicted in its application, constitutes ridgeline development which is prohibited by the Toro Area Plan.

4. To meet its burden of proof, Artichoke presented three subsequent letters, one dated June 19, 1991 from Supervisor Del Piero (Artichoke Remand Ex. 4), one dated July 1, 1991 from Planner Mounday (Artichoke Remand Ex. 5), and another from Supervisor Del Piero, dated August 1, 1991 (Artichoke Remand Ex. 9). Among other things, these letters state that Artichoke's site and tower proposal will receive "full and fair consideration", "can probably be approved", and "is likely to be approved." Artichoke urges that these statements by the local

authorities establish that it has reasonable assurance of obtaining approval of its site and tower proposal from the appropriate local authority.

5. Artichoke admits that there is a difference of approximately 200 feet between the coordinates for Artichoke's site as set forth in its amended application and what Artichoke showed in its hearing exhibits ("Opposition," filed September 24, 1991). Artichoke also admits that the above-quoted expressions of opinion by the Monterey County authorities are based upon their assessment of the site shown not in Artichoke's amended application, but in its exhibits tendered at hearing. The county authorities were also erroneously informed by Artichoke that its proposed tower height was ten meters rather than twelve meters.

Comparative Coverage

6. Both Artichoke and Villamil have submitted new comparative coverage exhibits in evidence (Artichoke Ex. 6; Villamil Ex. 12). The Artichoke exhibit uses the standard propagation prediction method contained in Section 73.313 of the Commission's Rules. Villamil complains that the standard prediction method of calculating distances to contours is inapplicable in this case because of terrain roughness in the westerly direction from the sites of the other applicants; thus, claims Villamil, the standard prediction method will not provide an accurate representation of coverage in terms of distances to contours.

7. The Villamil exhibit uses an alternative method to predict contour distances, namely, the method described in National Bureau of Standards Technical Note 101 ("Tech Note 101"). In employing its method, Villamil subtracted out any area not served under the prior engineering proposals, so that only areas and populations common to the areas and populations calculated in the Joint Exhibit and those calculated using the Tech Note 101 method were included. Villamil's employment of the computational method that it uses causes it to claim a slight coverage preference over the other applicants.

8. There are at least five full-time aural services available throughout the entire area proposed to be served by all of the applicants. Artichoke's Ex. 6 shows the total areas and populations within each applicant's 1mV/m contour as follows:

Applicant	Population Within 1 mV/m Contour (1980 Census)	Land Area Within 1 mV/m Contour (Square Kilometers)
Artichoke	278,178	2,238
Villamil	236,469	1,574
Crystal	168,360	1,301
CCTN	158,967	1,124
SBLP	147,726	1,046

III. CONCLUSIONS OF LAW

The Site Issue

9. At the hearing, the following stipulation was presented by counsel for Villamil and was accepted by the Presiding Judge:

> ". . . the stipulation would be that there is no -- that there is no issue with respect to the amended, i.e., current, transmitter sites of any of Crystal, CCTN and/or SBLP's applications, and that the transmitter site availability issue should be resolved in their favor, in favor of each of those three applicants . . . and that none of the Villamil exhibits are being introduced for the purpose of prosecuting that issue with respect to those three applicants, the transmitter site availability issue with respect to those three applicants."

Evidently of the view that the stipulation obviated the necessity of presenting direct and substantive evidence on the remanded issue, Crystal offered no evidence on the issue. California Community also offered nothing, but it appears to have elected that course quite independently of the stipulation.

10. Villamil makes this assertion about the stipulation:

> "[It] was understood by the parties not to have any application to the issue of whether or not any of the Buena Vista site parties should have been able to amend their applications, nor to whether the sites specified in their applications at the time this case was remanded were available to any of them. The stipulation applied only to the sites as they are currently specified."

Villamil provides no record support for what it claims was the parties' "understanding." Furthermore, the understanding now expressed by Crystal and California Community is that, in view of the stipulation, the issue remanded by the Review Board must be resolved in favor of those applicants.

11. The stipulation as recited by counsel for Villamil lacks precision and clarity. At the time the stipulation was offered and received, the site issue remanded by the Review Board concerned site availability "at the Buena Vista site specified in" the several applications. And the stipulation contains express language saying that "the transmitter site issue" (presumably, the issue as articulated by the Review Board) "should be resolved in their favor, in favor of" Crystal, and California Community. Now, however, Villamil has this to say: those applicants ought to be disqualified because neither of them "made any effort in this proceeding whatsoever to address the issue remanded by the Review Board to the Presiding Judge: to determine whether [either] of those applicants had reasonable assurance that their original sites would be available to them, given their engineering proposals." But if Villamil had that view of the case upon entering the stipulation and during the hearing, it also had the burden of proceeding with the introduction of evidence on that issue, a burden which it manifestly did not pursue. A warranted inference might be that Villamil, too, viewed that stipulation, at least initially, as resolving "the issue remanded by the Review Board."

12. It is clear in this muddle that Villamil did not carry forward its burden of proceeding with the introduction of evidence regarding Crystal and California Community. Had such evidence been introduced, it would have been designed to show, presumably, that the proposed sites of those three applicants are not likely to be approved. The Review Board assigned the burden of proof to each of the

applicants named in the issue. The absence of evidence that their proposed sites are not likely to be approved does not, in the view of the Presiding Judge, relieve those applicants of the burden of proving, affirmatively, that they have reasonable assurance of obtaining such approval. Crystal and California Community have not met that burden. They rely on a stipulation, an agreement among the parties, to establish the legal conclusion that "reasonable assurance" has been shown. The stipulation does not constitute substantive evidence of the matter required by the Review Board to be proved. There is no substantive evidence in the record on the basis of which the site issue can be resolved in favor of Crystal or California Community. Those applicants have not established that they are qualified to be Commission licensees.

13. The remanded issue must also be resolved against Artichoke. Its evidence in support of a finding of reasonable assurance consists of expressions of opinion by certain Monterey County authorities whose opinions are based on a site other than the site depicted in Artichoke's amended application. This is a failure of proof.

Comparative Coverage

14. Notwithstanding Villamil's contrary arguments, and its somewhat intemperate tone[3] in making those arguments, the Presiding Judge believes that it is the Mass Media Bureau which best states the reasons why Villamil's comparative coverage evidence cannot be relied upon.[4]

15. Section 73.313(e) of the Commission's Rules states that "supplemental showings should . . . include sample calculations." Villamil's comparative coverage exhibit contains no such calculations. The same section of the Rules provides that "Maps of predicted coverage should include both the coverage as predicted by the regular method and as predicted by a supplemental method." Villamil's comparative coverage exhibit shows coverage only as predicted by its supplemental method. If the appropriate maps had been included, it would have been possible to determine whether Villamil had used a worst case scenario for each applicant so as to assure that comparative upgrading did not occur. It also appears that Villamil used the wrong site to establish its predicted coverage. Villamil measures its contours from its new site, which proposes facilities of 3.0 kilowatts and 98 meters height above average terrain ("HAAT"), rather than from its original site, which proposed facilities of 3.0 kilowatts and 34 meters HAAT. Had Villamil applied its supplemental methodology to its original site, even greater decreases in coverage area and population served may have appeared in view of the mountainous terrain to the west and south of Villamil's original site. In employing its method, Villamil subtracted out any area not served under the prior engineering proposals, so that only areas and populations common to the areas and populations calculated in the Joint Exhibit and those calculated using the Tech Note 101 method were included. Stated otherwise, Villamil determined that areas served by the new proposals were not to be considered unless they were coextensive with the areas served by the original proposals. Here, where each of the applicants proposes to serve areas that already receive five or more full-time aural services, the policy against comparative upgrading only prohibits an overall improvement in the applicant's position by means of a post-cut-off amendment. *See, Sarasota - Charlotte Broadcasting Corporation*, 6 FCC Rcd. 1665, 1666 (1991). So, to properly evaluate the comparative positions of the applicants, Villamil had to compare the overall areas and populations predicted from both the old and new sites under its supplemental method and then choose the site which provided the lesser coverage. Villamil did not do that. Artichoke's Exhibit 6 complies with the Commission's rules and policies and is relied on herein.

16. Where areas are well served, the Commission has awarded a slight coverage preference to applicants proposing substantially greater overall coverage. *Simon Geller*, 90 FCC 2d 250, 268-69 (1982) (subsequent history omitted) (coverage superiority of four times more area and 315,000 more persons.) For less significant differences, a very slight preference has been awarded. *See Barton Broadcasting Co.*, 104 FCC 2d 785, 791 (Rev. Bd. 1986) (coverage difference of 44,215 or 27%); *Family Broadcasting Group*, 93 FCC 2d 771, 779 (Rev. Bd. 1983) (coverage differences of 42,000 persons or 8%; 140,000 persons or 34%; and 180,000 persons or 44%). Where the differences are deemed insignificant, no preference is awarded. *Susan S. Mulkey*, 4 FCC Rcd 5520, 5521 (1989) (coverage difference of 36,206 persons or 2%); *Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1962-63 (Rev. Bd. 1978), *review denied*, FCC 79-451, released July 15, 1979 (coverage difference of 12,000 persons or 5%).

17. Therefore, Artichoke merits a very slight preference over Villamil (41,709 persons or 18%) and a slight preference over Crystal (109,818 persons or 61%), CCTN (119,211 persons or 71%), and SBLP (130,452 persons or 89%). Villamil merits a very slight preference over Crystal (68,109 persons or 40%) and CCTN (77,502 persons or 49%), and a slight preference over SBLP (88,743 persons or 60%). Crystal merits a very slight preference over SBLP (20,634 persons or 14%). The differences between Crystal and CCTN and between CCTN and SBLP are too small to warrant award of a preference vis-a-vis each other.

Accordingly, IT IS ORDERED THAT the Issue Remanded by the Review Board IS RESOLVED ADVERSELY to Artichoke Broadcasting Corporation, Crystal Communications, Inc., and California Community Television Network, for failure to meet their respective burdens of proof.[5]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] Salinas Broadcasting participated in the hearing. Its application was subsequently dismissed (*Order*, FCC 92M-544) pursuant to its request.

[2] Villamil's summary of the stipulation, at page 6 of its proposed findings, gives a certain emphasis that is not warranted by the literal language of the stipulation as that language appears at Tr. 1154-55.

[3] In its post-hearing filings, Villamil takes issue to some extent with all of the other parties on the matter of comparative coverage, but it seems to maintain a special bile toward the Mass Media Bureau. According to Villamil, certain of the Bureau's approach "is disingenuous, to say the least", and certain of the Bureau's argument is "absurd"; the Bureau is faulted for

"clinging to" an inaccurate approach for no better reason than "that's the way we've always done it'", and "Heaven forbid, the Bureau will have to become technically proficient" in cases such as this; and it would help if the Bureau recognized the limitations of its position, "Rather than sticking its head in the sand."

[4] In its reply proposed findings, Villamil requests the dismissal of the Mass Media Bureau's proposed findings on the basis of lateness. The request is denied. Villamil also objects to the use of certain briefs earlier filed by the parties for any purpose reflecting "on the weight to be accorded Villamil Ex. 12." The objection is noted.

[5] In the event exceptions are not filed within thirty (30) days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-639

In re Applications of

TEXAS EDUCATIONAL BROADCASTING CO-OPERATIVE, INCORPORATED
Hornsby, Texas — File No. BPED-880401MG

THE UNIVERSITY OF TEXAS AT AUSTIN ON BEHALF OF TEXAS STUDENT PUBLICATIONS
Austin, Texas — File No. BPED-880722MA

For Construction Permit for a New Noncommercial Educational FM Station on Channel 219A

Appearances

John Crigler, Esq. and *Dawn M. Sciarrino, Esq.* on behalf of Texas Educational Broadcasting Co-operative, Inc.; *Richard A. Helmick, Esq.* on behalf of The University of Texas at Austin (Texas Student Publications); and *Charles Dziedzic, Esq.* on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: June 19, 1992; Released: June 25, 1992

I. PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Texas Educational Broadcasting Co-operative, Inc. ("Broadcasting") and the University of Texas at Austin ("University). These mutually exclusive applications were set for hearing in *Hearing Designation Order*, DA 90-1880, released February 5, 1991, and the following issues were specified for determination in this proceeding:

1) To determine whether there is a reasonable possibility that the tower height and location proposed by the University would constitute a hazard to air navigation.

2) To determine a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant and the area and population served thereby; b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service;

3) To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service;

4) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. The air hazard issue specified against the University was resolved in favor of the University by *Order*, FCC 91M-1375, released April 19, 1991.

II. FINDINGS OF FACT

Comparative Coverage Areas, Populations and Other Non-commercial FM services Issue

3. The following table lists the total areas (in sq. km.) and populations with in the applicants' respective 60 dBu contours:

Broadcasting	268,031 persons	710.7 area
University	329,454 persons	667.3 area

Neither applicant proposes to provide service to a white or grey area. Each will provide a 3rd, 4th and 5th service as follows:

Broadcasting	University
3rd Non-Commercial Educational-FM Service	
1,770 persons; 133.5 area	1,770 persons; 80.4 area
4th Non-Commercial Educational-FM Service	
48,062 persons; 255.6 area	93,165 persons; 249.2 area
5th Non-Commercial Educational-FM Service	
218,199 persons; 321.6 area	234,519 persons; 337.7 area

(Joint Ex. 1)

Share-Time Issue

4. The University and Broadcasting met during November-December 1990 to conduct share-time negotiations; such negotiations were unsuccessful, the University concluding that the proposal and missions of the applicants were incompatible and not conducive to a share-time arrangement. It is the University's view that a share-time arrangement would not be in the public interest since the University proposes substantial amounts of live sports coverage of University athletic events and time-sensitive news and public affairs programming, *e.g.*, coverage of campus

elections, student government matters, guest speakers and lectures and other similar events. The University's students (approximately 50,000), staff and faculty (approximately 20,000) and the general public would not be served, in the University's view, if coverage of these time-sensitive events were either delayed or foreclosed for lack of use of the FM broadcast frequency pursuant to a share-time arrangement. *University Exhibit 6.*

5. Broadcasting, however, supports a share-time arrangement, provided that it be given use of the FM frequency from 6:00 a.m. to 6:00 p.m., Monday through Friday, and all day Saturday and Sunday. Because Broadcasting intends to support its proposed operations, in significant part, through contributions from listeners, access to listeners during drive time hours (6:00-9:00 a.m. and 3:00-6:00 p.m.), when radio listenership is usually the greatest, will contribute to the long-term viability of its station. *Broadcast Exhibit 6.*

Section 307 (b) Issue

6. The University proposes Austin, Texas, as its community of license whereas Broadcasting proposes Hornsby, Texas, as its community of license. Hornsby, Texas is an unincorporated area of Travis County and is situated approximately nine miles east of Austin; all basic emergency, governmental, educational and other services for Hornsby are supplied by Travis County. No post office, telephone directory, newspaper (or other independent media) or other similar community identifiers are to be found in Hornsby. The 1991 edition of the *Texas Almanac* estimates the population of Hornsby as only 20 people. *University Exhibit 3.*

7. Austin, the capital of Texas, has an estimated 1990 population of 465,622, ranking it as the 27th largest city in the United States in terms of population. The Austin Metropolitan Statistical Area, consisting of Travis, Hays and Williamson counties, comprises a land area of 2,705 square miles and an estimated 1990 population 781,572, ranking the MSA as the 52nd largest in the nation in terms of population. Based on 1989-90 student enrollments totaling 99,550 persons, one in seven adults in the Austin MSA, is enrolled in an Austin area college or university. *University Exhibit 3.*

8. The University's proposed transmitter site is located approximately two and one-half miles southwest of the proposed transmitter site of Broadcasting; the proposed service areas of the University and Broadcasting encompass both Austin and Hornsby. *Joint Exhibit 1, Map 2.*

Contingent Comparative Issue

Integration of Cultural and Educational Objectives

9. Broadcasting is a non-profit corporation organized under the laws of the State of Texas. Broadcasting is a membership organization, controlled by a board of directors elected by its members. In changes to its bylaws which have been adopted, but not yet implemented, Broadcasting proposes to create a Community Board, half of which will be composed of representatives of organizations which serve Hispanics, women, youth/students, cooperatives and other community organizations in the Austin area. The other half of the Community Board will be composed of representatives of supporting organizations and individual volunteers and supporters. The Community Board will elect the Board of Trustees. *Broadcasting Ex. 1.*

10. Broadcasting was created for the purpose of "operat[ing] nonprofit broadcast facilities providing educational, noncommercial, community-accessible services for and by Texas citizens." Its programming goal is to provide its service area with a diverse selection of cultural and educational programming which is not currently available in the Hornsby/Austin market. It will achieve this goal by providing "high-quality, innovative, and diverse community-oriented programming to Austin, especially to those sectors of the community (including . . . Hispanics, women, and young people) who were previously underserved."

11. Broadcasting's station will be a "local access community radio station" which relies on volunteers from all facets of the community and provides "equitable access" to a wide variety of community groups. *Broadcasting Ex. 3.* Attachments 1, 2 and 3. The station's programming will include cultural and educational programs by and for senior citizens, children, minorities, women, and local theatrical and musical groups, as well as language education programs and other instructional programming. The station will serve as an outlet for cultural diversity by providing radio production training and air time to members of the community.

12. Broadcasting will provide community outreach and involvement through four different mechanisms: (1) by placing members of the public and representatives of various community groups on its Board of Directors *Broadcasting Ex. 1, pp. 1-2; Ex. 4, p. 1;* (2) by using individual volunteers from the community for the production of programs and for staffing the operation of the proposed station *Broadcasting Ex. 4, p. 1;* (3) by assisting community groups in producing their own radio programs and public service announcements *Broadcast Ex. 3, p. 1, Attachment 1; Ex. 4, p. 1* and (4) by providing opportunities for members of the public to be trained in the use of the broadcast medium and the production of broadcast programming *Broadcasting Ex. 4, p. 1.*)

13. Prior to commencement of program testing, Broadcasting plans to ascertain the needs and interests of the area through face-to-face or telephone interviews with community leaders. Its non-entertainment programming will contain news, live coverage of community events, and governmental activities. *Broadcasting Ex. 3, p. 1.*

14. The University is governed by a board of nine regents, selected from different areas of the State, nominated by the Governor and appointed with the advice and consent of the State Senate. In addition to the Graduate School and Division of Continuing Education, the University has a total of 14 individual colleges and schools, 53 departments, 285 degree program and 6,600 course offerings. *University Exhibit 1.* Its enrollment is comprised of more than 49,000 students (approximately 75% undergraduated and 25% graduate students).

15. The University's College of Communications, comprised of the Departments of Advertising, Journalism, Radio-TV-Film, and Speech Communication as well as the Center for Research on Communication Technology and Society and the Center for Telecommunication Services (CTS) was organized and established in 1965. CTS houses the facilities of noncommercial Station KUT-FM, an NPR affiliate station licensed to the University, the Longhorn Radio Network and the University cable system; these facilities include four television studios for the Radio-Television-Film Department, two radio studios and control rooms for instruction, three other radio studios and control rooms for broadcast use by Station KUT as well as for

the production of programs for the Longhorn Radio Network and National Public Radio and a master control room. *University Exhibit 1.*

16. The University will operate and administer the proposed station through Texas Student Publications, Inc. (TSP), a self-supporting, quasi-independent auxiliary unit established by the Board of Regents of the University of Texas System to administer the operations of student publications, defined as all media (print or electronic) on the campus of the University, pursuant to a Declaration of Trust between TSP and the Board of Regents of the University of Texas System. *University Exhibit 2.*

17. TSP is under the control and jurisdiction of a Board of Operating Trustees composed of 11 members as follows:

> Three eligible students in good standing from the University's College of Communications, elected by registered students in the University;
>
> Three students selected at large from the student body of the University;
>
> Two members of the voting faculty of the University's College of Communications and one voting faculty member from the University's College of Business Administration, all three appointed by the President of the University;
>
> Two professional journalists appointed by the President of the University.

In addition to the aforementioned voting members of the TSP Board of Operating Trustees, there are a number of individuals who serve as ex-officio non-voting members including the Dean of Students, the General Manager of TSP and the student editors and/or managers of all other student media, both print and electronic, under the jurisdiction of the TSP operating trustees. *University Exhibit 2.*

18. The TSP Board of Operating Trustees is subject to the direction, rules and regulations of the Regents of the University of Texas System. Generally, no action of the TSP operating trustees has any force or effect unless it has been approved by the University President. *University Exhibit 2.*

19. Since April 11, 1988, TSP has been operating a student-run cable radio station, known as the KTSB Radio, on the University's campus; KTSB Radio transmits only on close circuit facilities to the campus and community cable systems and cannot be received off-air by the general public. Although the University's cable system is connected to approximately 51 campus buildings, KTSB Radio is available only in seven buildings where radio facilities are connected to the cable system.[1] *University Exhibit 2.*

20. The University's proposed student-run radio broadcast station would supercede the student cable radio station, KTSB Radio. Existing KTSB Radio programming, however, would be continued on the proposed radio broadcast station should the University receive the construction permit; approximately eight percent of KTSB Radio's programming on the campus cable system is currently devoted to public affairs and should the University be awarded a construction permit for FM Channel 219A, the percentage of time devoted to public affairs programming would be increased slightly over the current eight percent weekly figure. *University Exhibit 4.*

21. The University's proposed student-run broadcast station would serve two ends. First, the proposed broadcast station would provide opportunities for students to receive practical experience in radio news, sports and entertainment programming and in broadcast management. The station will be an adjunct to course offerings in the departments of Journalism, Radio-Television-Film and Advertising, providing students with an opportunity to obtain hands-on experience and earn academic credit. *University Exhibit 4, Attachment A.*

22. Secondly, the University's proposed student-run broadcast station would serve as a source of campus information for students, faculty and staff as well as an outlet for the general public to receive student produced and alternative programming currently unavailable in the Austin market.

University Exhibit 4.

23. The University's student-run broadcast station proposes to originate public affairs programming from 9:30-10:00 a.m. and from 6:30-7:00 m. Monday through Friday. Local news programming and newscasts will be originated Monday through Friday from 9:00-9:30 a.m., noon to 12:15 p.m., 6:00-6:30 p.m. and 9:00-9:15 p.m. and from 6:00-6:30 p.m. on Saturday; TSP is a member of the Associated Press and the student-run station will have news reporters regularly assigned to cover the Austin City Council, the Texas State Legislature, University affairs, the Student Association, and student government. *University Exhibit 4.* In addition, *UT Crossfire*, a public affairs debate format program, will be aired on Sundays from 6:00-6:30 p.m., and *Nightalk*, a special news feature show, will alternate with *UT Focus*, a public affairs program on current issues, on Saturdays from 6:30 to 7:00 p.m. *Final Cut*, a movie review program, and *For the Record*, an interview show featuring touring bands, will be broadcast on alternate Saturdays from 6:00 to 6:30 p.m. On Mondays, from noon to 2:00 p.m., *UT Music*, a recorded program featuring performances by Music Department students, choral groups, jazz ensembles and individuals will be featured. *University Exhibit 4.*

24. In addition to the above programming, the University's student-run radio station will produce special public affairs and news programming on current issues, live play-by-play coverage of the University's nationally ranked women's volleyball team and other University team sports as well as regularly scheduled sports news and informational reports. For example, a weekly sports information program, *The Sunday Sports Thing*, featuring interviews with campus sports figures and sports commentary, and *Lockertalk*, a post-game interview show scheduled for 9:30-10:00 a.m. on Saturdays, will be aired. *University Exhibit 4.*

25. The University faculty and distinguished speakers who visit the University provide a resource to enhance educational opportunities of both the University student population as well as the general public; the University proposes to interview both distinguished faculty and guest speakers on current topics and issues. *University Exhibit 4.*

26. Finally, the University proposes to supplement its regular news broadcast with additional news programming; for example, *UT Week in Review*, a half-hour news magazine program produced by the broadcast journalism classes, and a live call and talk show covering issues of campus and local community interests will be aired. *University Exhibit 4.*

27. With respect to entertainment programming, the University proposes to offer alternative music with an emphasis on local music. *University Exhibit 4.*

28. The University, through TSP, which administers the operations of all University student publications, has in place a structure which may tend to ensure that the student-run radio broadcast station will be managed and operated in a professional manner. *University Exhibit 5.* A full-time broadcast supervisor is employed by TSP to provide the student staff with ongoing advice and counsel as well as recommendations on all aspects of broadcast operations.

Other Factors Demonstrating Superior Service

29. Broadcasting proposes to program its station on a 24-hour basis. *TEBC Exhibit 3.*

30. TEBC will install auxiliary power generating equipment at the studio and transmitting sites to insure uninterrupted service in the event of a commercial power outage. *Broadcasting Exhibit 5.*

31. The University has available and on-line auxiliary power generating equipment for use in the event of a power outage. *University Exhibit 7.*

III. CONCLUSIONS OF LAW

Comparative Coverage Areas, Populations and Other Noncommercial FM Services Issue

32. University will provide primary coverage (1mV/m) to 329,454 people whereas Broadcasting would serve only 268,031 people -- a difference of 61,423 or 18.6%. University would provide a fourth non-commercial service to 93,165 people whereas Broadcasting would provide a fourth service to only 38,062 people -- a difference of 45,103 or 48.4%; University would also provide a fifth non-commercial service to 234,519 people whereas Broadcasting would provide a fifth service to only 218,199 people -- a difference of 16,320 or 7%. Therefore, University is entitled to a preference over Broadcasting for more efficient coverage both overall and to underserved areas. The preference is deemed moderate.

Section 307 (b) Issue

33. The University has specified Austin as the city of license for its proposed station, whereas Broadcasting has specified Hornsby as the city of license for its proposed station. A Section 307(b) issue is imposed only where competing applicants specify separate communities and it becomes necessary to determine which community, if any, has the greater need for new transmission service. *See, e.g., Seattle Public Schools*, 4 FCC Rcd. 625, 642-43 (rev. Bd. 1988).

34. In *New York University*, 10 RR 2d 215 (1967), the Commission found that the fact that the mutually exclusive applicants were located in New York and Teaneck, New Jersey raised "in the traditional sense a 307(b) issue", but held that application of a "boilerplate 307(b)" analysis was not appropriate for non-commercial hearings. Thus, the Commission modified the 307 (b) issue: "to determine the number of other reserved-channel educational FM services available in the proposed service area of each applicant, and the areas and populations served thereby." Under the issue as modified, the Hearing Examiner was "permitted to give whatever weight he deems appropriate to the origination point of such signals." The Review Board upheld the Examiner's subsequent refusal to award any preference based upon differences between the communities from which the signals were originated. In support of its decision, the Board noted the fact that "the channels reserved for educational use are intended to serve the educational and cultural broadcast needs of the entire community to which they are assigned." *New York University*, 19 FCC 2d 358,371 (Rev. Bd. 1969).

35. The record evidence reflects that Hornsby, located approximately nine miles east of Austin and with a population of only 20 people, has no identity as a separate independent community deserving of its own transmission service but, rather, is an integral part of the Austin MSA for Section 307(b) purposes. Both Broadcasting and University propose to serve the Austin metropolitan area. Like the applicants in *New York University, supra*, each of the applicants in this proceeding has a "licensee's responsibility to serve his entire service area." 19 FCC 2d at 364. Neither applicant is entitled to a dispositive preference under Section 307 (b).

36. Broadcasting appears to recognize the correctness of that conclusion on the law as it has thus far developed. Nevertheless, Broadcasting offers up reasons why, on the "unique facts of this case," it believes it should be awarded a decisive Section 307 (b) preference. The "unique facts" seen by Broadcasting have to do with KUT-FM, Austin, Texas, of which the University is the licensee. The 60 dBu contour of University's present proposal in completely contained within the service contours of KUT-FM (Joint Ex. 1, p.1). Thus, the areas University will serve are already being served by its existing noncommercial station, KUT-FM. As Broadcasting sees it, "it would be a perversion of Section 307 (b) mandate to provide a 'fair, efficient and equitable distribution of radio service' if an applicant were rewarded for duplicating an existing service." Therefore, since University will not bring a "new voice" to its service area, and since Broadcasting would bring a "new voice" to its service area, Broadcasting should be decisively preferred pursuant to Section 307 (b). It appears, however, that the Commission has held, in *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd. 259 (1991), that ownership of other mass media interests is irrelevant under any circumstances in a noncommercial comparative proceeding.[2]

Contingent Comparative Issue

37. The *Hearing Designation Order* specified a contingent comparative issue in the event that a decision cannot be based on Section 307 (b) grounds. These comparative criteria consider the "extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants" and other factors which indicate that one applicant will provide superior service.

38. In *Seattle Public Schools*, 4 FCC Rcd. 625 (Rev. Bd. 1989), the Review Board defined some general principles which could be applied in construing the issue. It held that 1) the issue could not be read to apply a different burden of proof to institutional and non-institutional applicants, where each had been found eligible to hold a noncommercial license; and 3) that "educational and cultural objectives" were to be credited only if they were "directed outwardly to the stations's listening community, and not directed exclusively to the licensee itself." 4 FCC Rcd. at 640. Based upon the latter distinction, "vocational training, as such" was not cognizable as an "educational

objectives," since it looked "inward" to the needs of the applicant, rather that "outward" to the needs of the community.

39. The University's proposed student-run radio broadcast station would supercede the student-run cable radio station, KTSB. However, existing KTSB programming would be continued on the proposed radio station.

40. The University's proposed broadcast station would serve two ends. First, it would provide opportunities for students to receive pratical experience in radio programming and broadcast management, and at the same time constitute an adjunct to various course offerings available for academic credit. Secondly, the proposed station would serve as a source of campus information for students, faculty and staff as well as an outlet for the general public to receive student produced and alternative programming currently unavailable in the Austin market. At least a portion of the first of these objectives amounts to a training function for University's students. Vocational or training functions cannot be recognized as cultural or educational objectives for which comparative credit will be awarded. The University's second objective is to serve as a source of campus information for students, faculty and staff, and to serve as an outlet for student programming. And, a seemingly *secondary* aspect of that objective is the production of alternative programming currently unavailable in the Austin market. It thus appears that while certain of the University's proposed station will serve the informational and cultural needs of the greater Austin community and not merely the needs of the University of Texas campus, the University's objectives are primarily inward-looking.

41. Broadcasting was created for the purpose of "operat[ing] nonprofit broadcast facilities providing educational, noncommercial, community accessible services for and by Texas citizens. It proposes a community access station governed by members of the community. The station will air educational and instructional programming and culturally diverse programming, much of which will be produced by volunteers and community groups. Broadcast's proposed station will provide community outreach through four different mechanisms: 1) by placing members of the public and representatives of various community groups on its Board of Directors; 2) by using individual volunteers from the community for the production of programs and for staffing the operation of the proposed station; 3) by assisting community groups in producing their own radio programs and public service announcements; and 4) by providing opportunities for members of the public to be trained in the use of the broadcast medium and the production of broadcast programming. The proposed operation of Broadcasting will be integrated into its overall cultural and educational objectives (as those objectives are permitted to be credited under *Seattle Public Schools, supra)* to a greater degree than will be that of the University. Its cultural and educational objectives are directed outwardly toward the entire community, and not inwardly toward its own self-regarding interests. Broadcasting receives a moderate preference over the University on this account.

Other Factors

42. The University appears to claim *per se* preferences over Broadcasting because: 1) the University has in place an institutional structure which it believes will ensure the operation of the station in a professional manner, and 2) unlike Broadcasting, University's financial ability to effectuate its proposal is not dependent upon "public contributions" which offer only a "speculative chance for effecting a superior broadcast service."

43. To award a preference to the University merely because it has in place an institutional structure which may or may not result in superior operation of the station would be unfair to Broadcasting, and the presiding officer declines to award any such preference. Also, both applicants are already deemed financially qualified, and no more is required in that regard. There is simply no basis for awarding an applicant a preference on this account.

44. Broadcasting contends that because it proposes to operate 24 hours a day, whereas the University did not specify its hours of operation, it should obtain a comparative preference. No preference will be given. All noncommercial educational FM stations are licensed for unlimited time operation, except those stations operating under a time-sharing arrangement. Section 73.561(a). It cannot be determined on this record that there are clear and substantial operating differences between the applicants, i.e., that the University would operate at a meaningfully lower quantitative (hourly) level than would Broadcasting. It is presumed that the University, as does Broadcasting, proposes to operate its station on a 24 hour basis.

45. Both applicants propose emergency generating equipment. Neither is entitled to a comparative advantage in this regard.

Share-Time Issue

46. The University is opposed to a share-time arrangement. It contends that its proposal is incompatible with that of Broadcasting, and that a share-time arrangement would be an ineffective and inefficient use of the frequency. Broadcasting, however, supports such an arrangement provided it has use of the frequency from 6:00 a.m. to 6:00 p.m., Monday through Friday, and all day Saturday and Sunday. Broadcasting believes that such a schedule will enable it to reach a substantial portion of its target audience by broadcasting during daytime and weekend hours, and the University can reach a substantial portion of its target audience by broadcasting during evening hours. Also, since Broadcasting's operation is to be supported largely through contributions from listeners, Broadcasting believes that access to listners in "drive time" hours (6:00 - 9:00 a.m. and 3:00 - 6:00 p.m.), when radio listenership is traditionally greatest, will contribute to the long-term viability of the station.

47. While the applicants' goals are not identical, there is nothing to support the contention that the University's objective of serving its target audience, with emphasis on the University of Texas campus, and Broadcasting's objective of serving its target audience, without undue emphasis on the campus, are incompatible or irreconcilable objectives. The evidence suggests that the applicant's goals and target audiences are, to some extent, overlapping. For example, both applicants seek to serve a student population and to offer training opportunities for student volunteers. A time-sharing arrangement will be ordered.

IV. ULTIMATE CONCLUSIONS

48. The University is entitled to a moderate preference for its superior coverage proposal, and Broadcasting is entitled to a moderate preference for the integration of its cultural and educational objectives in serving the public. Neither applicant is decisively preferred under Section 307(b). In these circumstances, it is determined that a time-sharing arrangement between the applicants would result in the most effective use of the channel and best serve the public interest.

49. Accordingly, IT IS ORDERED THAT the applications of Texas Educational Broadcasting Co-operative, Incorporated and the University of Texas at Austin, ARE GRANTED Subject to the following operating terms:

50. The two parties shall share the use of the frequency. Broadcasting is authorized to operate on Monday, Wednesday, Friday and alternate Sundays. The University is authorized to operate on Tuesday, Thursday, Saturday and alternate Sundays.[3]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] According to the University's Food and Housing Administration, approximately 5,200 students are housed in a total of 3,000 dormitory rooms in 14 buildings on campus; only the TV lounges in these dormitories are connected to the campus cable system, but none of these lounges has a radio receiver connected the cable system; accordingly, even though the University's campus cable system serves the student dormitories, KTSB Radio is not received in those dormitories. *University Exhibit 4.*

[2] The Commission stated that because a central purpose for setting aside noncommercial educational channels is to assist educational entities in the advancement of their educational work, "the number of other stations owned by an applicant, commercial or noncommercial, is irrelevant to the determination of which [noncommercial] applicant would best serve that purpose." 6 FCC Rcd. at 260.

[3] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Inital Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-557

In re Applications of

PRAISE BROADCASTING NETWORK, INC. File No. BPH-880519ME

WRIGHTSVILLE BEACH RADIO LIMITED PARTNERSHIP File No. BPH-880519MI

For Construction Permit for a
New FM Station on Channel 229A
in Wrightsville Beach, North Carolina

Appearances

Christopher D. Imlay, on behalf of Praise Broadcasting Network, Inc; *William D. Silva* and *Shaun A. Maher*, on behalf of Wrightsville Beach Radio Limited Partnership; and *Gary P. Schonman*; on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: June 18, 1992; Released: June 25, 1992

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Praise Broadcasting Network, Inc. (Praise) and Wrightsville Beach Radio Limited Partnership (WBRLP) for authority to construct and operate a new FM commercial radio station on Channel 229A in Wrightsville Beach, North Carolina.[1] The *Hearing Designation Order*, DA 90-1610, released January 9, 1991 specified the following issues with respect to Praise and WBRLP:

> To determine (with respect to WBRLP) whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation;
>
> To determine which of the proposals would, on a comparative basis, best serve the public interest;
>
> To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. The air hazard issue was resolved summarily in WBRLP's favor. *See Order*, FCC 91M-1716, released May 24 1991. The only remaining issue to be resolved is the standard comparative issue.

3. A prehearing conference was held March 11, 1991 and the hearing was held June 10 and 11, 1991.

4. Financial and financial certification issues, and a transmitter site availability issue, were added with respect to George S. Flinn by *Memorandum Opinion and Order*, FCC 91M-1717, released May 24, 1991, and a Phase II hearing session was scheduled for trial of those issues. However, as noted in note 1, Flinn voluntarily dismissed his application and the hearing session was cancelled. The record was closed on September 10, 1991. Proposed findings of fact and conclusions of law were filed on October 8, 1991 and replies thereto were filed on October 18, 1991.

Findings Of Fact

Praise Broadcasting Network, Inc.

Background

5. Praise is a non-stock, non-profit corporation organized under the laws of the State of North Carolina. It was incorporated in 1985. The Articles of Incorporation were filed April 1, 1985, and the corporation has been approved by the Internal Revenue Service as a Section 501(c)(3) corporation, organized for religious, charitable, scientific or eductional purposes. The corporation has no members. Initially, there were four officers and directors of Praise, including Dennis W. Anderson and Michael P. Escalante. Two individuals who were charter members of the Corporation have resigned or withdrawn from the corporation. Present officers and directors of Praise include only Dennis W. Anderson, President, Vice President and Director, and Michael P. Escalante, Secretary, Treasurer and Director. Both Anderson and Escalante are United States Citizens,and were involved in Praise from its inception. There are no other holders of attributable or non-attributable interests in Praise, nor anyone else in a management or policy-making role. Escalante and Anderson have equal authority in managing the corporation. Assuming they can not reach a consensus. Anderson would have the authority to make the final decision. Praise Ex. 1, p. 1; Praise Ex. 2, p. 1.

6. The initial President of the Corporation was one Sam Yeakle, who executed the Articles of Incorporation. Praise Ex. 10, p. 3. There was also an initial Director, one Harvey Cannon, who resigned from the Praise Board of Directors. Both Yeakle and Cannon resigned prior to the filing of the instant Praise application. Cannon's resignation was tendered in October of 1986. Yeakle resigned, as he was to move out of state. An additional director, one Peter Chimento, was added to the board, but he disappeared thereafter, and was thus considered by Messrs. Anderson and Escalante to have been removed as a director. Tr. 60, 61.

7. The Corporation was formed, according to the Articles and Bylaws, "to educate in and proclaim the Gospel of Jesus Christ and the Word of God in a positive and attractive way by all available means, including individual witnessing, use of publications and media broadcasts including radio broadcasting". Praise Ex. 10, p. 2. The bylaws initially provided that there could be as few as three and as many as twelve members of the Board of Directors, which manage the affairs of the Corportion. Praise Ex. 11, p. 2. However, it was recognized by Messrs. Anderson and Escalante that they were the remaining directors. As a member of "housekeeping", they adopted an amendment to the Bylaws that reduced the minimum number of directors to two, to reflect their actual plan.[2] It is not the plan

of the two principals to add any members to the Board of Directors. Tr. 62, 63, 120, 123. The maximum number of directors was left at twelve, however, so as to maintain some flexibility many years down the road. Tr. 64, 123. As Escalante put it, "(t)he intention was that we were going to have two (directors) and we didn't intend to add anybody else. But apparently, we left it open for the possibility somewhere in the future, . . . and I mean later in the future, we have nothing in our mind whatsoever about adding anybody." Tr. 64. Anderson said the same thing, when asked why, it his intent was to have only two directors, the amendment to the bylaws continued the option to have at least two, but no more than twelve directors: "Well, I mean, you know, what is going to happen in the future, I don't know, if I die, hopefully our children would carry on the ministry. Our intent is Mike and I are going to do it. It's just boilerplate, I mean that was put in initially by an attorney, and we have no reason, except that it would provide the opportunity for succession, if that ever were to be a requirement". Tr. 123, 124. At the time that Praise decided to apply for the Wrightsville Beach channel, the remaining principals at that time were Messrs. Anderson and Escalante, and they made the decision to apply together. Tr. 122.

8. Anderson was responsible for hiring the engineer, the attorney and for obtaining both of Praise's tower sites. Tr. 57-58. While Escalante is Treasurer of Praise, Anderson has written all of the checks. Tr. 58-59. In this regard, Anderson is to provide all of the estimated $350,000 needed for construction and operation of the new station. *See* "Petition For Leave to Amend" filed September 4, 1990 (Official Notice taken).

Integration

9. *Dennis W. Anderson* proposes to be the station's full-time general manager. Praise Ex. 2 at p. 1. In order to effectuate this pledge, Anderson intends to partially withdraw from his active business to devote a minimum of 40 hours per week to the station. *Id.* As full-time general manager, Anderson will determine policy for and supervise the station's news, any sales, business, and public affairs staff, including the hiring and firing of employees in those departments. *Id.*

10. Anderson "is President and sole stockholder of McAnderson's Incorporation". Praise Ex. 2 at p. 1. "McAnderson's is the franchisee of, at present, seven McDonald's restaurants in the general vicinity of Wilmington, North Carolina". *Id.* Anderson purports to spend "approximately two hours per day on McAnderson's work. "The remainder of his time is spent doing civic work and religious ministry obligations". *Id.* at p. 2. In order to comply with his 40 hour per week integration pledge, Anderson states that he "will reduce his commitment of time, if and as necessary to fulfill his full time pledge...." *Id.* at p. 3. Anderson claims that he will also "reduce the time he presently spends in his civic and ministerial work in the community as necessary to accomplish this". *Id.*

11. Anderson's franchise/license agreements with McDonald's Corporation (MC) state that "a close personal working relationship with the License (Dennis W. Anderson) in the conduct of his McDonald's restaurant business, his accountability for performance of the obligations contained in this License and his adherence to the tenets of the McDonald's System constitute the essence of this License". *See* Praise Exhibit 9 ("Exhibit A To The Franchise Letter Agreement" dated June 22, 1987) at §1. Furthermore, MC expects "strict adherence" to its standards and policies. *Id.* More importantly, the franchise agreement states that Anderson "acknowledges his understanding . . . that Licensor (MC) will grant licenses only to those individuals who live in the locality of their McDonald's restaurant; actually own the entire equity interest in the business of the restaurant and its profits, and who will work *full-time* at their McDonald's restaurant business". *Id.* (emphasis added).

12. Under the terms of the same agreements, Anderson must "diligently and fully exploit his rights in the License by *personally* devoting his best efforts . . . ." *Id.* at §13 (emphasis added). Anderson must also "keep free from conflicting enterprises or *any other activities* which would be detrimental to or interfere with the business of the Restaurant". *Id.* (emphasis added). Anderson can only assign his interest in the License "with the prior written consent of Licensor (MC) . . . " *Id.* at §15. MC must give its consent to anyone chosen by Anderson as an assignee of his franchises/licenses. *Id.* If it feels Anderson is in breach of his agreements/licenses, MC can seek to enforce them through "injunctive relief, damages, or specific performance". *Id.* at §19. As stated in MC's "Franchise Letter Agreement" (Letter Agreement) signed by Anderson on June 10, 1987, the "Franchise is offered to: Dennis W. Anderson personally, and to no others, and may not be accepted by any other person or corporation . . . " Praise Exhibit 9 "Letter Agreement" at §6.

13. In 1987, Anderson assigned the franchises/licenses of his McDonald's restaurants to a wholly-owned corporation called McAnderson's Inc. (McAnderson's). *See* Praise Ex. 9. Anderson's original Franchise Agreement states that " . . . the Franchise may be assigned . . . only to a corporation which is wholly and exclusively owned by you (Dennis Anderson). No other individual or corporation shall acquire any interest . . . without McDonald's prior written consent." Praise Ex. 9 "Franchise Letter Agreement" at §6. Under the terms of the "Assignment and Consent To Assignment Of Franchise To A Corporation" (Assignment), the Assignee, McAnderson's, "hereby covenants and agrees it will . . . perform all the terms and conditions of said License and Lease". Praise Ex. 9 "Assignment" at §1. Furthermore, the "Assignment" states that "Assignor (Anderson) is in no way discharged from personal liability to McDonald's by this Agreement and Assignor specifically agrees to remain *personally* liable for the full and faithful performance of the agreements and covenants of the License and Lease". *Id.* at §3 (emphasis added).

14. Finally, under this "Assignment", "[A]ll terms and conditions of the franchise, including the License and Lease, remain in full force and effect, including, *without limitation*, any requirement imposed on named operators to devote designated time and effort to the conduct of the McDonald's restaurant business". *Id.* at §13 (emphasis added). During the past seventeen years, while he has been a McDonald's franchisee, Anderson has not held any full time employment other than McDonald's. Tr. 182.

15. Despite being put on notice by the Presiding Judge as to the need for such testimony, Praise failed to submit any evidence that the McDonald's Corporation would permit Anderson to rescind his contractually-obligated full-time commitment to his McDonald's franchises, in order to work 40 hours a week at the new Wrightsville Beach station. *See* Tr. 36-46, 225. Anderson testified that he currently spends "15 hours a week on McAnderson's type

business . . . " Tr. 171. He further testified that "In an average week, I spend, in a combination of civic activities and ministry, 25 hours". *Id.* While, Anderson testified that "If Praise is awarded to me, I intend to refocus any time and concentrate on radio" he went on to admit that " . . . it's hard for me to divorce myself from being a community leader . . . ." *Id.*

16. Anderson is and has been for approximately seventeen years a resident of the Wilmington, North Carolina area. Initially from Illinois, Anderson now lives in Wilmington, within the 70 dBu contour of the proposed station. From 1979 to 1984 he lived in Wrightsville Beach. Prior to 1979, when he first moved to the area, he lived in Wilmington. Praise Ex. 3.

17. Anderson is active in local civic affairs in the Wilmington, North Carolina area. During and prior to 1979, he was President of the Rotary Club (1979-1978), and a member of its Board of Directors (1976-1977). He was a member of the Cape Fear Sportsman's Club Board of Directors, a member of the Executive Board of Directors of the Chamber of Commerce, and a member of its Tourist's Development Committee and Plans and Program Committee. He was the Vice President of the Cape Fear Council of the Boy Scouts, involving eight counties, and was in charge of public relations. He assisted in forming Project Up, a community program, and was a member of its executive Board of Directors. He was a member of the Committee of 100, an Industrial Development Committee. Praise Ex. 8, p. 1.

18. During and prior to 1984, he was a member of the Board of Directors of the Wilmington Chapter, Full Gospel Businessmen's Fellowship International; a Member of the Board of Directors and Vice President of Maranatha Ministries, Bethel, North Carolina; Deacon and President of the Men's Fellowship, Myrtle Grove Presbyterian Church; Founder and Member of the Board of Directors of Elderhaus, an organization which operates two senior citizen's daycare centers in Wilmington; Participant in Young Life Ministries, for spiritual training of young people; and Chairman, New Christian Radio/TV Station Task Force, organized to bring Christian-influenced media to the Wilmington/Wrightsville Beach area. Praise Ex. 8, p. 1.

19. Presently, Anderson is an Elder of the Myrtle Grove Presbyterian Church. Either individually, or through McAnderson's Corporation, Anderson has contributed his time and energy, as well as financial contributions, to the following events; Band Days for High Schools, a fund raising project; bus safety program for elementary schools; providing films for use in Elementary schools, such as bike and fire safety and ecology; he has provided support for elementary school fundraisers, carnivals and fairs; he has provided $4,500 in scholarships; organized the Clean Community Systems Program; supported the Athlete of the Week program, and the Fellowship of Christian Athletes, and numerous other endeavors. Praise Ex. 8, p. 2.

20. Anderson has contributed his time, as well as financial support, to the March of Dimes Telerama; Cape Fear Voluntary Action Center; Ronald McDonald House; Soulsaving station; Red Cross; Boy and Girl Scouts; Health Department; Services for the Aging; Special Olympics; Good Shepherd Soup Kitchen; Cape Fear Gospel Rescue Mission; UCP Developmental Center; the Jaycees; Humane Society of New Hanover County; New Hanover Memorial Hospital; Boy's Home of Lake Waccamaw; Ocean Sciences Institute, Project Up; Committee for Cultural Enrichment of the Greater Brooklyn (N.C.) Area; Migrant Worker's Day, Baptist Association Day Camp; Calvary Baptist Church Missionary Work; Baptist Association Hospital Christmas Party; Ogden Christian Advent; Southport and Carolina Beach Parades; UNC-W Student Aid Association (sponsored statewide swim meet); Pop Warner Football Team Sponsorship; Bike Rodeos, Bike Safety Poster Contest sponsorship; UNC-W Sports Program Support; UNC-W Athlete of the Month sponsorship; and UNC-W Basketball Gold Award sponsor. Praise Ex. 8, pp. 3, 4.

21. Anderson is a white male. He has no past broadcast experience.

22. *Michael P. Escalante* proposes to be the station's full-time program director. *Id.* at p. 2. In order to effectuate this proposal, Escalante will partially withdraw from his active business pursuits to devote a minimum of 40 hours per week to the station. *Id.* As full-time program director, Escalante's duties will include the determination of policy for and supervision of the station's program material and part-time staff. He will have the authority to hire and fire all staff associated with programming. *Id.*

23. Escalante presently devotes his full business time to his work as an independent insurance agent. Praise Ex. 2 at p. 4. His current commitment is 30 to 50 hours a week. Tr. 67. He shares an office with another agent, and they share an administrative assistant." *Id.* In its Written Direct Case, Praise states that in order to effectuate his proposed full-time pledge at the Wrightsville Beach station, Escalante has " . . . resigned as of the last part of 1990 from the insurance agency where he worked, and became an independent agent." *Id.* Praise claims that Escalante will have his administrative assistant "schedule his appointments, and . . . prepare material for his appointments". *Id.* Praise further states that Escalante's role "would be to make a presentation to a potential client, and then have the processing work related to the application for the insurance coverage done by the administrative assistant". *Id.* Praise claims that "this procedure has been followed since the first part of 1991". Praise also claims that Escalante's "reason for moving to this shared office arrangement was that he could utilize the services of a knowledgeable administrative assistant . . . to the extent that he could devote no more than twenty hours a week to the operation of his insurance business". Finally, Praise adds that Escalante has no agreement with any insurance company which requires that he devote full time to the insurance business. *Id.*

24. At hearing, however, Escalante testified "Now, let me say, this, that with the granting of the permit for the station, I am not sure that this (the current "administrative assistant") is going to be the person that I am going to be using . . . ." Tr. 69. Escalante also testified that his plans may change with respect to who he actually hires to take over his current duties and his plans with the other insurance agent with whom he shares office space are open and have not been worked out yet. Tr. 73 & 84. Furthermore, while Escalante stated that this shared "administrative assistant" has reduced his time commitment by "about 10 hours, 15 hours at this point" he again stated that "this isn't necessarily the lady that I am going to be using" and that he had "not made finalized plans". Tr. 71-72. Escalante further stated that "It could be that I could use this girl, but I have not discussed with her whether she has the time to be able to do what I need her to do, exclusively . . . ." Tr. 72. More specifically, Escalante testified that he had not discussed the future with the current person in that role. Tr. 94. Escalante finally admitted that

"I personally think I am going to have to hire somebody else, because I would like somebody to exclusively take care of what I do so that I in fact can guarantee the 40 hours a week for the station". Tr. 72.

25. Escalante's insurance business requires that he visit people to talk to them. Tr. 74. It also requires that he visit them at their convenience and not his own. *Id.* When questioned further, Escalante admitted that he visits clients during the work day. *Id.* Escalante estimates that he currently makes "one, maybe two calls a day, during the daytime" sometimes at his office, other times at his clients' offices. Tr. 74-75.

26. Escalante currently has contracts with seven different insurance companies. *See* Flinn Exhibit 2, Praise Ex. 14-19. Escalante initially testified that none of these insurance companies required that he produce a certain amount of work. Tr. 75-76, 79, 98. However, Escalante was shown a copy of his "Agent's Agreement" with "The Investment Life Insurance Company of America" dated January 2, 1991. *See* Flinn Ex. 2 and Tr. 100. Escalante was reminded that under Section 10 of this Agreement, "[I]f any payments to the Agent (Michael P. Escalante) . . . under this AGREEMENT, shall fail to exceed either $300.00 per year or $25.00 per month, The Company's obligation for future payments shall cease and all liability of The Company pursuant to this AGREEMENT shall end". *Id.* After having been reminded of this term of the Agreement, Escalante stated: "Okay. That's a minimum. It is so minuscule that I hadn't even considered it." Tr. 100. Earlier in his testimony, Escalante admitted that with respect to Investment, that " . . . they would be unhappy if I didn't produce at a certain level . . . ." Tr. 81. He also casually stated that " . . . they would like me to produce a half a million dollars . . . " and then explained with respect to this figure that he had " . . . just pulled that out of the air . . . " Tr. 81-82.

27. Escalante's "Producer's Compensation Agreement" with "John Alden Life Insurance Company" dated September 19, 1988, states that the "Agreement may be terminated by the Company if you (Mike Escalante) have not produced an amount of business satisfactory to the Company in the last twelve months, or for any other reason". Praise Ex. 14 at §8. Under the terms of his Agreement with "Columbus Life Insurance Company" dated June 15, 1990, the "Contract will automatically terminate . . . At the end of any agency year in which you (Michael P. Escalante) do not have $1,000 in Earned First Year Commissions". Praise Ex. 16 at §7. Under the terms of his "Supervisory Agent's Contract - Schedule of Commissions" with "PFL Life Insurance Company" dated April 18, 1991, the Company "will have no obligation to pay any further commissions to you after the first calendar year in which your total paid commissions are less than three hundred and no/100 dollars ($300.00). Praise Ex. 17 at §5(d).

28. Escalante testified that his current administrative assistant handles two of fours areas of work related to his insurance business: preparing and processing the insurance policies. Tr. 69. However, Escalante admitted, however, that he cannot delegate his responsibilities as an agent and that he is personally responsible for soliciting applications. Tr. 78. Furthermore, Escalante's insurance business is straight commission, his commissions are based solely on his work and his insurance business accounts for his entire livelihood. Tr. 79-80 & 87.

29. Escalante has discussed his radio station plans with Jim Wolfe, agency vice president for Investment Life Insurance Company (Investment), one of the insurance companies with whom he is contracted. Upon disclosing his future plans to Wolfe, Escalante testified, " . . . I saw him kind of back up a little and posture and look at me, wondering if I could actually do it." Tr. 77. Escalante has nothing in writing from Investment as to their feelings about his full-time commitment to the new radio station. Tr. 81. Finally, Escalante testified ". . . he (Mr. Wolfe of Investment) has not been not supportive and all I can say is that I could just sense that he would like to have my full attention, but he is not asking for it, and he is not demanding it, of course." Tr. 83.

30. When questioned whether he intends to work regular business hours at the new station, Escalante testified "I don't know that I would set any 8:00 to 5:00 hours . . . ." Tr. 85. When questioned what he would do if his insurance business began to require more than a couple of hours a day of his time, Escalante testified " . . . if I see that intellectually I can't be honest and giving it the whole time that I need to give it, then I would have to consider compensation from the station." Tr. 86.

31. Escalante is and has been continuously since 1977 a resident of Wilmington, within the 70 dBu contour of Praise's proposed station. His address in Wilmington is and has been since 1977 at 222 Bradford Road." *Id.*

32. Escalante has been involved in the following civic activities. He is, and has been for the last seven years an elder of the Myrtle Grove Presbyterian Church, located in Wilmington. He is also a deacon of that Church. Praise Ex. 8 at p. 5. Escalante serves as a Board Member (one of thirteen) of the Carolina Hispanic Community, Inc., located in Wilmington. *Id.* This group was formed in 1990. Tr. 90. Escalante has, during the last year been a member of the SBA Region 4 Advisory Council. Praise Ex. 8 at p. 5. Also, in the last six months, Escalante was appointed to the Board of the Private Industry Council. *Id.* Escalante was on the Board of Maranatha Ministries for eight years. *Id.* This organization's headquarters is in Bethel, North Carolina, outside the proposed service area of the new Wrightsville Beach station and it has been dormant for the last year. *Id.* and Tr. 91.

33. Escalante has been involved since 1984 with the Society of St. Andrew, a group organized to feed the hungry. Praise Ex. 8 at p. 5. Escalante was the Board Secretary for the Cape Fear Gospel Rescue Mission, organized to help alcoholics and people that are down and out. The organization is based in Wilmington. He was on the Board of Directors and was Secretary of the Executive Committee in 1986, 1987 and 1988. *Id.* at 5-6. Escalante has also been a member of the Board of the Vineyard Youth Camp, (and) a Vice President and Board member of the Full Gospel Businessman's Fellowship International in Wilmington. *Id.* at 6. Escalante was also the Chairman of Churches and Publicity Chairman of the group sponsoring the showing of Christian films in . . . New Hanover Count[y], North Carolina. Finally, Escalante has also been a member of Young Life Committee, operating in Wilmington, North Carolina. *Id.*

34. From March of 1977 to December of 1977, Escalante worked for Smiles Associates as director of Christian Broadcasting. Praise Exhibit 7. He produced (and) . . . developed programming and music to be aired. He was also the sales manager in the Wilmington area. *Id.* Escalante has no other broadcast experience. Tr. 88-89.

35. Escalante was born in Mexico and is of Hispanic descent. Praise Ex. 4. Escalante is a citizen of the United States. *Id.*

Diversification

36. Neither the applicant, Praise Broadcasting Network, Inc., nor either of its officers and directors has any interest, attributable or non-attributable, in any medium of mass communications, other than the Wrightsville Beach application.

Auxiliary Power

37. Praise will provide auxiliary power both at its tower site and its studio in order to provide for continuous operation in the event of commercial power failure. Praise Ex. 5.

Wrightsville Beach Radio Limited Partnership

Background

38. WBRLP is a Limited Partnership organized under the laws of the State of North Carolina. It has one General Partner, Martha Spainhour, who owns a 20% equity interest and 100% voting interest, in the partnership. There is one limited partner, Coolidge Road Corporation (Coolidge), a Maryland corporation, which holds an 80% equity interest in the partnership but no voting interest. Joseph Kenary is President, Treasurer and sole director and stockholder of Coolidge. Mary Louise Kenary, the wife of Joseph Kenary, is Secretary of Coolidge. WBRLP Ex. 1.

39. Kenary believes he heard about the availability of an allocation for Wrightsville Beach about 4 or 5 years ago either from a publication or from Forbes Blair, who is now deceased. Tr. 187. Kenary, an attorney in Montgomery County, Maryland with a general practice, knew Blair for about 20 years. Blair, who lived in the same county, referred some cases to Kenary, none dealing with a broadcast license. Tr. 189, 191.

40. Kenary has never been a licensee of a broadcast station. Kenary's only involvement with a broadcast station was as a stockholder of a corporation holding a limited partnership interest in a Hartford, Connecticut broadcast station that has since been sold. Tr. 189-190. Blair was not involved in the Hartford station. Tr. 190.

41. Kenary, who was familiar with the 80-90 proceeding, was attracted to Wrightsville Beach because it was a resort area with increased summer population and also adjacent to the city of Wilmington. Tr. 190-191. Kenary had also considered exploring other allocations on the east coast. However, Wrightsville Beach is the only allocation which Kenary pursued. Tr. 194.

42. In the early part of 1988, Kenary and his wife spent the night in Wrightsville Beach, on the way to South Carolina. The following morning, after reflecting on the possibility of a radio station there, Kenary decided to make inquiries as to the availability of a local person to participate with him in the ownership of a broadcast station. Tr. 197-199. Kenary was interested in a person who was active in the community and well regarded, preferably a woman or minority person. Tr. 197-198. Kenary's intention from the outset was to be solely an investor and ". . . the local person would have to control it." Tr. 198.

43. Kenary initially visited the Wrightsville Beach Town Hall and Martha Spainhour (then Martha Walden) was recommended to him as a person who fit the description of what he was seeking. Tr. 197-199. Kenary then visited the Greater Wilmington Chamber of Commerce and spoke to the Director who told him that he should contact Spainhour, who was vice president of the Wrightsville Beach Council. Tr. 199-200, 307. Kenary arranged a meeting at Spainhour's house that same day. Tr. 200.

44. Spainhour recalls that Kenary told her about the availability of the Wrightsville Beach frequency, that he was a practicing lawyer and would not be able to run the station, and that he was looking for someone interested in the ownership of a radio station who was from Wrightsville Beach "and was a real go getter, being a hard worker and dedicated." Tr. 307. Spainhour interpreted Kenary's general statement as seeking information as to a person who might be interested, rather than focusing on her. Spainhour expressed interest in the venture. Tr. 308. Kenary told her to think about the proposition and the meeting ended with the understanding they would further discuss the matter. Tr. 313-314.

45. Spainhour subsequently called Kenary. Tr. 308. In the phone conversation, they discussed entering into a limited partnership and Kenary agreed to prepare a draft of an agreement and send it to her for review. Kenary subsequently sent a draft and after a number of changes requested by Spainhour were made, the agreement was finalized. Tr. 258-259, 261, 314. Wrightsville Beach Ex. 4. In the course of the conversation, or at the earlier visit at Spainhour's house, Kenary agreed to send information about himself including letters of reference, which he did. Spainhour also agreed to provide information about herself and sent Kenary a resume with references. Tr. 312-313. Spainhour does not recall if she supplied any financial information in written form but does recall she told him orally about her financial status. Tr. 313.[3]

46. Schedule A of the limited partnership agreement provides that the limited partner shall make a capital contribution of $180,000. It also provides that the general partner shall make a capital contribution of $15,000, of which one third was to be paid upon execution of of the partnership agreement, another one third upon designation for hearing and the final one third upon award of the construction permit. WBRLP Ex. 3, p. 8, 28. The requirement for Spainhour to make a capital contribution was included at the request of Kenary to insure that Spainhour had a financial stake and, thus, would not desert the venture. Tr. 209. Spainhour does not get her capital contributions back if the application is not granted. Tr. 278, 344. Spainhour made her first capital contribution in a timely manner but failed to make the second payment at the time of hearing designation. Tr. 255-256. Spainhour testified that she fully intended to make the payment. She further testified that she had a letter from her mother advancing her inheritance which she intended to use if necessary. Tr. 328.[4] Kenary stated, assuming the failure to make timely payment is a default, he does not intend to take any action. Tr. 267, 268. He is satisfied that Spainhour is committed to the quest to obtain a broadcast station. Tr. 267. In addition, to his capital contribution, Kenary, at the request of Spainhour, personally obtained a $200,000 bank loan which he agreed to provide to the partnership to cover construction and initial operating expenses. Praise Ex. 12, 13; Tr. 271-272.

47. The limited partnership agreement was executed May 13, 1988 in Spainhour's local counsel's office. Tr. 194, 363. Kenary came to Wilmington to bring the limited partnership agreement. Tr. 363, 364. At the time of the signing, the site owner of the property was also in the local counsel's office in connection with the agreement for use of the transmitter site. The terms had been previously agreed to and Kenary played no role in obtaining the site. Tr. 325, 363, 365. Upon his return to the Washington, D.C. area, Kenary dropped off the site information at the applicant's engineer's office. Tr. 239-240. Aside from preparing the draft of the agreement, Kenary, also in the pre-formation stage, offered Spainhour advice on counsel for the applicant. In this regard, Kenary gave her names of three law firms, including Blair. Spainhour contacted Blair first and having found him satisfactory, hired him as attorney for the applicant. Tr. 330, 367.

48. The record reveals that Kenary has maintained an entirely passive role since the formation of WBRLP. The application was prepared by Spainhour with the assistance of her counsel. She personally prepared a draft of the application, wrote the program service statement and the Model EEO portion. Also, she worked with Blair in preparing the financial certification. Tr. 334, 337-341, 347. Also, she negotiated and obtained the initial and amended site, required to satisfy FAA objections. Tr. 363-365. Further, Spainhour opened the partnership bank account, signed the bank resolution and has sole check writing rights. Also, she, rather than Kenary, filed the limited partnership agreement with the Secretary of State and filed the public notice. Tr. 366.

Integration

49. Spainhour proposes to be integrated into the management of the proposed station. WBRLP Ex. 2 at p. 1. Spainhour will devote full-time, at least forty (40) hours a week to the proposed station as its General Manager. *Id.* In this capacity, Spainhour will be responsible for all duties commonly associated with that position, including but not limited to overall supervision of the construction of the station, overall supervision of station operations, news, programming, sales and public affairs. *Id.* She will be personally involved in sales. *Id.* She will hire and fire all station personnel and will establish and implement all station policies. *Id.*

50. Spainhour is currently President and sole stockholder of Action Casting of the Southeast, Inc. (Action). *Id.* at p. 2. If WBRLP is granted the permit for the new Wrightsville Beach station, then prior to commencement of Program Tests, Spainhour will have transferred a 20% interest in Action to her currently employed assistant manager, who will have become manager of the day-to-day activities of the business. *Id.* The transfer will take the form of a gift. Tr. 351. At that time, and thereafter, Spainhour will limit her commitment to this business to no more than 10 hours per week. *Id.* She has no other business interests or employment commitments. *Id.*

51. Spainhour's business consists of providing casting for films made in the Wilmington, North Carolina area. Tr. 298-299. This involves working with the director or producer of a film to cast actors and actresses for parts in the production. Tr. 297. Spainhour testified that first she reads through the script and that takes "an hour to two hours . . . ." *Id.* "Then you meet with the producer. That's usually anywhere from 45 minutes to an hour and you negotiate a contract, and then from there you set up auditions for your director and you cast all of the speaking parts . . . then you cast all of the background people . . . ." *Id.* Spainhour summarized her work by saying that "as a casting director, my main responsibility is to magnify the director's vision . . . . After I've done that, and that's -- that's picking them out, I don't even have to be at the auditions. I have an assistant that will call all these talent agents up and will spend a day or two in auditions and they just come in." Tr. 300.

52. Spainhour stated that it takes her "about an hour, 45 minutes to an hour" to negotiate a contract with a producer." Tr. 356. Spainhour testified that she currently has one employee - an "assistant casting director" who has worked for her for a year and who does everything Spainhour does except "make final decisions on the selections for auditions in front of the director . . . ." Tr. 296. Spainhour further testified that, "I don't have to be there (at the business). She (her assistant) could do it all but I -- I am there because it is my business, you know, and I've had nothing else going." Tr. 302. In response to a question as to how she came up with the 10 hour limit in her Direct Written Testimony, Spainhour testified:

> Okay. I don't feel like I have to supervise my assistant casting director. She has already proved to me -- my daughter was in the hospital for quite a while and we had three movies going at one time, which was a tremendous responsibility, and she had to take the ball and run with it and she did a phenomenal job, because I wasn't there at all, and it was a -- a real bad situation, in that I was very nervous about the business, but she just did a bang up job.

Tr. 368.

Spainhour further added:

> My 10 hours would be just, you know, an hour a day finding out from her and learning how -- how everything is going . . . it takes about an hour to two hours to read a script . . . and while you are reading that script, you are casting it mentally . . . Once I have cast it and I hand it to her, she is actually the one who calls the talent agent, sets all the audition times up . . . .I don't have to be there. All I have to do is make sure I pick the right people.

Tr. 368-369.

53. Spainhour, WBRLP's sole General Partner, currently resides at 7305 Gray Gables Lane in Wilmington, North Carolina. WBRLP Ex. 2. She has lived at this address since September, 1987. From April 1985 to September 1987, she resided at 9 Oak Landing Road in Wilmington, North Carolina. *Id.* From June 1983 to April 1985, she resided at 201 Lagoon Drive in Wrightsville Beach and from June 1982 to June 1983, she resided at 911 Lumina Drive in Wrightsville Beach. *Id.*

54. From her birth on August 24, 1947, until April, 1966, Spainhour resided at various addresses in Wilmington and Wrightsville Beach, North Carolina. All of the above-listed addresses are within the proposed service area of the proposed Wrightsville Beach station. *Id.*

55. Spainhour has been involved in civic activities in Wrightsville Beach and Wilmington, North Carolina. WBRLP Ex. 2. She is founder of the Wrightsville Beach Holiday Flotilla & Christmas Boat Parade (Flotilla) (and was its Chairman from 1984 to 1986), a local civic event which was rated as one of the Top 20 tourism events in the Southeastern United States by the Southeast Tourism Society and is the third largest event held in Wilmington and surrounding beaches. *Id.* Since 1987, she has been Overall Executive Director of the Flotilla. In 1990, the Flotilla was expanded to include a festival in Wrightsville Beach Park. The Flotilla is sponsored by the Wrightsville Beach Council of the Greater Wilmington Chamber of Commerce, and in 1991 was also sponsored by the Wrightsville Beach Chamber of Commerce. *Id.*

56. Spainhour has been involved in the following Wrightsville Beach and Wilmington civic groups:

Greater Wilmington Chamber of Commerce 1982 - 1990

Member of the Board of Directors, 1982 - 1985

Wrightsville Beach Council of the Greater Wilmington Chamber of Commerce

1982-1990

Vice President, 1983-1987 Activities included fundraising and assistance with Wrightsville Beach projects, such as beach beautification and sponsorship of community events such as the above-referenced Flotilla.

Liberte de Timex Beach Party

1986

Hostess for fundraising event for French-American Committee for the Restoration of the Statue of Liberty held at Wrightsville Beach.

University of North Carolina at Wilmington 1988 - present

Volunteer Drama Instructor

WBRLP Ex. 2.

57. Martha Spainhour is a white female. WBRLP Ex. 2.

Diversification

58. Neither Martha Spainhour nor any principal of WBRLP hold any interest in any broadcast station or broadcast application, nor do they have any interest in any other media of mass communications. WBRLP Ex. 2.

Auxiliary Power

59. WBRLP's proposed station will utilize auxiliary generating equipment to ensure continued operation in the event of a power outage. WBRLP Ex. 2.

CONCLUSIONS

60. Neither Praise or WBRLP warrants a diversification demerit. Resolution of this case rests on a comparison of the respective integration proposals of Praise and WBRLP.

61. Praise is a non-stock, non-profit corporation. Although the by-laws provided for three to twelve directors, Praise, since before the filing of its application, has been operated by two directors, Anderson and Escalante. In this regard, the by-laws were recently amended to permit operation by two directors, consistent with Praise's past and present *modus operandi* and its proposed operation in the foreseeable future. It is fundamental that in order for the directors of a non-stock corporation to be treated as "owners" for integration purposes, they must "hold relationships of personal interest and responsibility comparable to those of principals." *Farragut Television Corp.*, 5 FCC 2d 93, 98 (Rev. Bd. 1966). The treatment of such directors as owners for integration purposes has always been based on the directors having significant control over the broadcast facility to the exclusion of others. *Id*; see also *City of Jacksonville*, 21 FCC 334, 418 (1956).

62. There is no question that Anderson and Escalante have been and are exclusively in control of Praise, notwithstanding the by-law's original provision for a minimum of three directors. Moreover, there is no evidence indicating exercise of control by a third person in the foreseeable future. There is, therefore, no basis for reducing Praise's integration credit. Contrary to WBRLP's contention that Praise's ownership structure is "nebulous" and "ephemeral" the record makes clear that Praise's intent since the time of the filing of the application until the present time has been to rest control solely on Anderson and Escalante. The fact that Praise was tardy in amending the by-laws is of no consequence and does not lead to a different conclusion. Moreover, there is no basis for WBRLP's claim that Escalante's role in Praise has been "passive". Escalante has been a principal of Praise since its inception in 1985 and there is no evidence suggesting Escalante is or has been a "figurehead". On the contrary, the evidence indicates that Escalante has been a full participant in decisions concerning Praise and will continue to work together with Anderson in the future.

63. However, while Praise's organizational structure passes muster, Praise has failed to demonstrate entitlement to integration credit. Praise has not met its burden of showing that Anderson and Escalante will be able to effectuate their full-time integration proposals.

64. Anderson, the proposed full-time general manager, is the sole stockholder of McAnderson's Inc., the franchisee of seven McDonald's restaurants. Under the terms of his license/franchise agreements with McDonald's, Anderson is contractually obligated to commit full-time to his seven McDonald's restaurant franchises. Praise has failed to submit evidence that the McDonald's Corporation would permit Anderson to rescind his contractually-obligated full-time commitment to his McDonald's franchises. Under the circumstances, Anderson's proposed full-time commitment to work at the radio station cannot be credited. *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948 (Rev. Bd. 1988).

65. Praise urges that *Washoe-Shoshone* is inapposite, urging that since Anderson has assigned his franchises to a wholly owned corporation, McAnderson's Inc., it is McAnderson's Inc. that is now responsible for commiting full-time to the franchise. The contention is without any support and is rejected. Praise's interpretation is com-

pletely at odds with paragraph 3 of Assignment Agreement which states that Anderson, as Assignor, is "in no way discharged from personal liability to McDonald's by this Agreement and . . . specifically agrees to remain personally liable for the full faithful performance of the agreements and covenants of the License . . . ." Praise Ex. 9 at 2. Also, paragraph 13 of the Assignment Agreement provides that "[all terms and conditions of the franchise, including the License and Lease, remain in full force and effect, including, without limitation, any requirement imposed on named operators to devote designated time and effort to the conduct of the McDonald's restaurant business." Praise Ex. 9 at 6. Anderson, who owns all the stock in McAnderson, Inc., is the only licensee of the McDonald's franchise. The Commission's recent decision in *Coastal Broadcasting Partners*, 7 FCC Rcd 1432, 1433 (1992) does not assist Praise. In *Coastal*, unlike *Washoe Shoshone* and the instant case, the individual proposing full-time integration (Rosemary Garcia) was not the only licensee of the McDonald's franchise. The Commission held that since the other licensee, Henry Garcia, intended to assume the contractual responsibilities for the restaurants, Ms. Garcia was free to fulfill her integration pledge.

66. Similarly, Praise can not receive integration credit for Escalante's integration proposal. Escalante, a sole proprietor, owns an active insurance business and, according to Escalante, presently devotes 30-50 hours to his business. This business currently consists of contracts with seven different insurance companies. Escalante's insurance business accounts for his entire livelihood. Escalante works solely on commissions which is wholly dependent on the amount of insurance business he generates. In this regard, some of Escalante's insurance contracts contain minimum production requirements that must be met to avoid termination. Escalante does not propose to cut down on his insurance business to carry out his full-time integration pledge. Rather, he proposes to reduce his administrative duties by continuing to share an administrative assistant or hire his own administrative assistant. However, Escalante recognizes that he cannot delegate his responsibilities as an agent and that he is personally responsible for soliciting new clients and making daily client contacts. Needless to say, Escalante's retention of an administrative assistant depends on his ability to generate insurance business.

67. Praise has not met its burden of adducing specific and credible evidence demonstrating a reasonable likelihood that Escalante will be able to effectuate his full-time commitment to the radio station in light of his intention to retain his insurance business. Consistent with *Stanley Group Broadcasting, Inc.*, 3 FCC Rcd 5017, 5021-5022 (Rev. Bd. 1988), no integration credit will be awarded Escalante's situation is similar to that of Richard Amador in *Stanley*. Amador also pledged full-time integration while intending to retain his insurance brokerage business. The Board there determined that Amador had not demonstrated how he could accommodate his work schedule so that both vocations could be fulfilled. Similarly, Praise has not made the required persuasive showing as to how Escalante will accommodate his insurance business so as to fulfill his full-time commitment to the radio station. Praise receives no integration credit. In this regard, no part-time credit will be awarded since a determination can not be made on the record as to the precise number of hours Anderson and Escalante will be able to devote to the station. *See CubanAmerican Ltd.*, 5 FCC Rcd 3781, 3785 (1990).

68. Unlike Praise, WBRLP warrants full-time integration credit for the proposed participation of Martha Spainhour as general manager of the radio station. The record makes clear that WBRLP's ownership structure is *bona fide*. WBRLP's limited partner, Joseph Kenary, has been properly insulated since the adoption of the applicant's bifurcated ownership structure. Kenary's pre-formation activities have been extremely limited; the record is devoid of any evidence of Kenary's participation in post-formation activities.

69. As reflected in the record, during the pre-formation state, Kenary prepared a draft of the partnership agreement, which was substantially revised on the advice of Spainhour's local attorney,[5] and offered Spainhour advice on selecting counsel for the applicant. Praise makes much of Kenary's securing financing for the station without Spainhour's participation. However, Praise overlooks the fact that, at the behest of Spainhour, Kenary obtained a personal loan and he then agreed to turn the proceeds over to WBRLP for construction and initial operating expenses. Since the loan was to Kenary personally and not to the applicant, Spainhour's lack of participation is of no consequence.[6] As also reflected in the record, Kenary has maintained an entirely passive role since the formation of WBRLP and there is no evidence indicating his role will change in the future. Spainhour has maintained complete control of WBRLP. She prepared the application with the assistance of counsel and has been responsible for every activity involving WBRLP. *See* Finding 48, *supra*. Also, Spainhour has a financial stake in the applicant.

70. The Commission has made clear that the post-formation record is ordinarily the best evidence of who will control the ongoing license. Pre-formation activities are probative only if the post-formation record is inconclusive as to who will control the ongoing licensee. *Coastal*, *supra*, 7 FCC Rcd at 1434. Here, Kenary's pre-formation activities have been extremely limited and Kenary's post-formation activities are non existent. The record conclusively demonstrates, that in accordance with her formal status as WBRLP's only general partner, Spainhour will have exclusive managerial control over the applicant.

71. Spainhour is the owner of her own film casting business. She proposes to transfer a 20% interest to her currently employed assistant manager who will take over the day-to-day activities of the business. Spainhour will limit her commitment to this business to no more than 10 hours a week. WBRLP has made a detailed showing of how the proposed integration of Spainhour will be effectuated. *Pentecostal Revival Association*, 1 FCC Rcd 842, 61 RR 2d 1267, 1269 (Rev. Bd. 1986). Where such a detailed showing has been made, the commitment should not be rejected "absent persuasive proof" that it cannot be met. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 596, 51 RR 2d 1478 (Rev. Bd. 1982). No such proof has been presented here. WBRLP has not departed from the proposal contained in its original application and has provided reasonable assurance that it will be carried out. Since WBRLP has made a specific and credible showing of how Spainhour's full-time commitment to the proposed station can be effectuated, it deserves to be fully credited. *Bradley, Hand and Triplett*, 89 FCC 2d 657, 659-661, 51 RR 2d 1349, 1345 (Rev. Bd. 1982).

72. In summary, WBRLP deserves 100% full-time quantitative integration credit; Praise receives no credit. This conclusion mandates WBRLP's grant of the Wrightsville

Beach application and moots the need to consider qualitative enhancements. *Van Buren Community Service Broadcasters, Inc.*, 50 RR 2d 115, 119 (Rev. Bd. 1981).[7]

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[8] the application of Wrightsville Beach Radio Limited Partnership for a construction permit for a new FM station Channel 229A in Wrightsville Beach, North Carolina IS GRANTED; and the application of Praise Broadcasting Network, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The application of David McGowan and E. L. Finch d/b/a Oleander Radio Partners (Oleander) (File No. BPH-880519OJ) was dismissed for failure to prosecute. *See Order*, FCC 91M-925, released March 12, 1991. The application of Harbor Islands Broadcasting, Inc. (Harbor) (File No. BPH-880519MA) was voluntarily dismissed. *See Order*, FCC 91M-1670, released May 20, 1991. The application of George S. Flinn, Jr. (File No. BPH-880519NT) was voluntarily dismissed. *See Order*, FCC 91M-2792, released September 10, 1991.

[2] The amendment (Praise Ex. 11) is undated and unsigned. Anderson could not recall when the amendment was actually adopted by Praise. Escalante testified that Praise's communications counsel prepared the amendment. Communications counsel stated for the record that the amendment was mailed to Escalante and Anderson on March 28, 1991. Tr. 66, 108, 123.

[3] Kenary believes he requested and Spainhour sent him a copy of her tax return. Tr. 205. Spainhour does not recall being asked for a tax return. Tr. 312. In this connection, Kenary repeatedly made clear that he did not recall the details of his conversations with Spainhour and his testimony reflected that he was hazy as to the details of events transpiring more than three years ago. *See* Tr. 201-205. On the other hand, Spainhour displayed a better recollection of these inconsequential details and where Spainhour's and Kenary's recollections diverge, Spainhour's has been relied on. In this regard, the Presiding Judge found both Kenary and Spainhour to be truthful, fully forthcoming, and entirely credible.

[4] By *Order* released May 14, 1992 (FCC 92M-563), the Presiding Judge accepted for Section 1.65 purposes, WBRLP's April 8, 1992 amendment reporting that Spainhour had made her second capital contribution.

[5] Spainhour reviewed the draft of the limited partnership agreement, brought it to her local attorney to review, and made revisions to seven different pages. Tr. 314-315; WBRLP Ex. 4. In this connection, Spainhour "collectively negotiated" the 80/20 equity split with Kenary. Tr. 315.

[6] Praise argues that WBRLP's limited partnership agreement indemnifies the general partner from acts performed by her as general partner, other than negligence or bad faith. Praise's contention is without basis. Neither a reading of Sections 5.4.1 and 5.4.2 of WBRLP's Limited Partnership Agreement, the pertinent provisions, or Spainhour's understanding of these provisions, supports Praise's contention. Spainhour explained that her understanding was that "the limited partner is only liable for the amount of his investment" but that she is "liable for everything." Tr. 357-358. Further, while the partnership itself can not sue her unless she is grossly negligent, she is personally liable to third parties. Tr. 360. Thus, it is clear that Praise's conclusion that Spainhour will be held harmless for all her actions is not a correct statement of the agreement nor of Spainhour's understanding of its legal effect.

[7] Assuming qualitative enhancements were reached, Praise would prevail over WBRLP. Praise's enhancement consisting of 50% minority credit and local residence/civic involvement credit is superior to WBRLP's credit for local residence/civic involvement.

[8] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-198

In re Applications of	
EDWARD F. and PAMELA J. LEVINE	File No. BPH-900514MM
MAURICE F. A. BATTISTI	File No. BPH-900515ME
MARY C. MURRAY	File No. BPH-900516MT
CAROL A. MORGAN	File No. BPH-900516MU

For Construction Permit for a
New FM Station on Channel 298A
in Endwell, New York

Appearances

James L. Oyster on behalf of Edward F. and Pamela J. Levine, *Arthur V. Belendiuk* on behalf of Maurice F. A. Battisti, *Stephen C. Simpson* on behalf of Mary C. Murray, *J. Brian De Boice* on behalf of Carol A. Morgan, and *Robert A. Zauner* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: June 18, 1992; Released: June 25, 1992

1. This proceeding involves the mutually exclusive applications of Edward F. and Pamela J. Levine (Levines), Maurice F. A. Battisti (Battisti), Mary C. Murray (Murray), and Carol A. Morgan (Morgan) for a construction permit for a new FM station to operate on Channel 298A in Endwell, New York. The Commission designated these applications for hearing, together with five other mutually exclusive applications which have since been dismissed with prejudice.[1]

2. The *Hearing Designation Order* (H.D.O.) designated the following issues:[2]

(1) If a final Environmental Impact Statement is issued with respect to Edward F. and Pamela J. Levine, Maurice F. A. Battisti, Mary C. Murray, and Carol A. Morgan in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. Sections 1.1301-1319.

(2) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(3) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. The contingent environmental issue set forth in (1) above was deleted as to each of the named applicants. *See Order*, FCC 91M-3164 (released October 28, 1991 (Levine)); *Memorandum Opinion and Order*, FCC 91M-2996 (released October 4, 1991 (Battisti)); *Order*, FCC 92M-71 (released January 17, 1992 (Murray)); *Memorandum Opinion and Order*, FCC 91M-2990 (released October 4, 1991 (Morgan)).

4. A prehearing conference was held on October 8, 1991, and an admissions session was held on December 16, 1991. The hearing was held on January 7, 1992, and the record was closed on the same date (Tr. 360).

FINDINGS OF FACT

Comparative Coverage

5. The parties have stipulated that there is no significant difference in the areas and populations to be served by the various applicants (Joint Exhibit I). Accordingly, no applicant is entitled to a comparative advantage over its competitors under this factor of the comparative analysis.

APPLICANTS

Edward F. and Pamela J. Levine

6. The Levines have applied for the new FM facility at Endwell, New York as joint tenants with 100 percent ownership of the applicant (Levine, Ex. #1; Levine, Ex. #2).

Diversification

7. The Levines jointly own 25 percent of the stock of the licensee of FM Broadcast Station WKLL, Frankfort, New York. In the event that their application for the Endwell facility is granted, they will divest themselves of their interest in the Frankfort, N.Y. station. The Levines have no other media interests (Levine, Ex. #1; Levine, Ex. #2).

8. Mr. Levine currently serves as President of WKLL, Frankfort, New York and as a broadcast consultant. He has indicated that he will terminate all current and future employment in the event that their application for the Endwell, New York facility is granted (Levine, Ex. #1).

Best Practicable Service

Edward F. Levine

9. Mr. Levine will serve as the full-time General Manager and Program Director of the proposed station, devoting at least 40 hours per week to his duties at the station. As General Manager, he will be responsible for the day-to-day operations of the station, and he will supervise all phases of the same. As Programming Director, Mr. Levine will be responsible for the station's day-to-day programming (Levine, Ex. #1).

10. Mr. Levine currently resides in Fairfax, Virginia. In the event that his application is granted, he proposes to move to Endwell, New York (Levine, Ex. #1).

11. Mr. Levine has been involved in broadcasting during his entire adult life. He has performed a wide variety of functions at various radio stations in New York, Texas, and Virginia, including those usually associated with the positions of Program Director, On-The-Air Announcer, Operations Manager, and President (Levine, Ex. #1).

Pamela Levine

12. Mrs. Levine will serve as Station Manager and General Sales Manager at the proposed station, devoting a minimum of 40 hours a week to her duties at the station. As Station Manager, she will assist the General Manager in the day-to-day operations of the station, and as Sales Manager, she will be responsible for supervising the station's sales staff (Levine, Ex. #2).

13. Mrs. Levine currently resides in Fairfax, Virginia. In the event that the Levines' application for the Endwell facility is granted, she is committed to move to Endwell, New York in order to assume her duties at the station (Levine, Ex. #2).

14. Mrs. Levine does not claim any past broadcast experience.

Auxiliary Power

15. In the event that their application is granted, the Levines will install an auxiliary power generator at both the transmitter and studio sites to assure continued operations in the event of an emergency (Levine, Ex. #1).

Maurice F. Battisti

16. Mr. Battisti is an individual applicant for the new FM facility in Endwell, N. Y. (Battisti, Ex. #1).

Diversification

17. Mr. Battisti has no media interests (Battisti, Ex. #3).

Best Practicable Service

Integration

18. In the event that his application is granted, Mr. Battisti will serve as General Manager of the proposed station, on a full-time basis, working a minimum of 40 hours per week (Battisti, Ex. #2). His duties at the station will include, for example, the overall management of the station's operations and personnel, the formation and implementation of personnel policies, and the implementation of the station's Equal Employment Opportunity Program. In addition, he will manage the financial affairs of the station, and have the responsibility of ensuring compliance with all FCC rules and policies (Battisti, Ex. #2).

19. Mr. Battisti has lived at a point within his proposed station's 1 mV/m contour since 1942, and does not intend to move. He has been involved in a number of civic activities within the proposed service area, including various Kiwanis clubs from 1972 to the present, and various Republican Party organizations in the late sixties, early seventies, and late eighties up to the present. In addition, he has served on the Board of Directors of the following organizations: Girls Club of Western Broome County (1987 to the present); the Community Memorial Center (1988 to the present); Prison Rehabilitation Incorporated (1977 to present) -- Mr. Battisti was also a founder of this organization and served as President/Chairman of the Board and Vice President; Broome Community College Alumni Association (1987-90) -- He also served as President and Vice President; and the American Cancer Society (1967-77, 1991). He is also a member of the following additional organizations: Friendship Force of Greater Binghamton, member (1984 to present), President (1989 to present); St. Ambrose Church, member (1988 to present), Lector (1988 to present); Endicott Republican Committee, member (1987 to present), Chairman (1988 to present); Knights of Columbus, Third Degree (1964 to present); and Alhambra Sidona Caravan 212 (1982 to present). Mr. Battisti is a former member of the following organizations: Endicott Development Association, member (1989-90), member, Advisory Board (1989); Town of Union, Republican Executive Committee, Chairman (1988-90); Benevolent Protective Order of Elks (1974-86); Muscular Dystrophy Association, Labor Day Telethon Volunteer (1985); Oswego Lions Club (1972-73); Boy Scouts of America, Assistant Scout Master (1959); Bloome County Community Ambassador to Ceylon (Sri Lanka) and India (1966); Jaycees, New York state (1966-70), Chairman of Governmental Affairs (1970); Endicott Jaycees, Vice President (1969); Susquehanna Toastmasters (1966-69), Vice President (1969), the Southern Tier Chapter of New York State Restaurants Association (1970-86), President (1981-83); and St. Anthony of Padua Church (1942-88), Lector (1965-75).

Auxiliary Power

20. Mr. Battisti will install an auxiliary power generator at the studio and transmitter locations (Battisti, Ex. #4).

Mary C. Murray

21. Ms. Murray is an individual applicant for the new FM station in Endwell, New York (Murray, Ex. #1).

Diversification

22. Ms. Murray has no ownership or other attributable interest in any medium of mass communications (Murray, Ex. #1).

Best Practicable Service

23. Ms. Murray will work a minimum of 40 hours a week as General Manager of her proposed station. As General Manager, she will have full and complete managerial responsibility for the station, and she will oversee all aspects of the station's operations. In addition, she will have final decision-making authority concerning the station's policy as well as other matters typically regarded as management responsibilities in the operation of a commercial FM station (Murray, Ex. #1).

24. Ms. Murray has lived within the 70 dBu contour since approximately 1935. Ms. Murray performed volunteer fund raising work for the Multiple Sclerosis Society, Binghamton, New York (approximately 6 hours a year) from 1975 to 1982; the Leukemia Society of America, Syracuse, New York (approximately 6 hours a year) from 1975 to the present; the American Cancer Society, Binghamton, New York (6 hours a year) from 1980 to 1988, with no participation during three of those years; the

American Heart Foundation, Binghamton, New York (6 hours a year) from approximately 1982 to 1988; The United Way of Broome County, Vestal, New York (10 to 15 hours a year) from approximately 1970 to 1988 with no participation in five of those years. In addition, she was a member of the Young Republican Club of Broome County, Binghamton, New York from approximately 1960 to 1969, (8 hours a month); the Broome County Women's Republican Club, Binghamton, New York from approximately 1971 to 1981 (five hours a month); and the Broome County Republican Party, Binghamton, New York, serving as a committee member from approximately 1970 to 1984, (6 hours a month). Ms. Murray has also been a member of the Monday Club, Binghamton, New York since 1980 and was Chairman for a special event in 1981 (5 hours a month (September to May)); Christ Episcopal Church, Binghamton, New York (60 hours a year) from 1988 to the present; the Broome County Historical Society, Inc., Binghamton, New York (one hour a month) since 1990; the Roberson Center For Arts and Sciences, Binghamton, New York (one hour a month) from 1990 to the present, serving as a volunteer for special events from 1991 to the present; the United Health Services Foundation, Binghamton, New York (one to two hours a month) from May 1991 to the present; and the Suny-Binghamton Foundation, Harper Forum, Binghamton, New York (one to two hours a month) from 1988 to the present.

25. From 1970 to 1972, Ms. Murray was a mansion guide for the Roberson Center for the Arts, Binghamton, New York (three to four hours a month), and from 1970 to 1972 she was a den mother for Cub Scouts of America Den 5, Pack 33, Binghamton, New York (six hours a month); field trip chaperon from 1968 to 1969 for the Girl Scouts of America, Binghamton, New York (two to three hours a month); and Teacher's Aide from 1964 to 1965 for the Alexander Hamilton School, Binghamton, New York (approximately four hours a month) (Murray, Ex. #1).

26. Ms. Murray does not claim past broadcast experience.

Auxiliary Power

27. Ms. Murray will install auxiliary power equipment to ensure the continued operation of her station in the event of a power outage (Murray, Ex. #1).

Carol A. Morgan

28. Ms. Morgan has applied as an individual for the construction permit for the new FM station at Endwell, New York (Morgan, Ex. #1).

Diversification

29. Neither Ms. Morgan nor any member of her immediate family has any other interest in any medium of mass communications (Morgan, Ex. #1).

Best Practicable Service

30. Ms. Morgan will work full time, a minimum of 40 hours a week, as General Manager of her proposed Endwell, New York station. As General Manager, she will set station policy on all matters, will hire and fire station personnel, make programming decisions, and direct the station's Equal Employment Opportunity Program. In addition, Ms. Morgan will have overall and final supervisory authority over all aspects of the station's operations (Morgan, Ex. #1).

31. Ms. Morgan has resided within the predicted service area of her proposed station for approximately 19 years (Morgan, Ex. #1). In the event that her application is granted, she will move to Endwell, New York (Morgan, Ex. #1). Ms. Morgan has been a member of the Hillcrest Community Association since 1979, serving as chairperson (1982) and co-chairperson (1983 and 1984) of its summer program for community youth, and on its Board of Directors between 1979 and 1984. She is a past member of the Binghamton, New York Junior League (1979-81) serving on several committees, and she also served as a volunteer for the American Red Cross (1988-89) and for the United Way (1981). In addition, she served as grade mother at Bell Elementary School (1975-79), at Hillcrest Elementary School (1982-83) and at Port Dickinson School (1980-86) (Morgan, Ex. #1). Ms. Morgan, since 1984, has been a member of the Chenango Valley High School Booster Club, and since 1979 of Saint Catherine's Church and the church's Sunshine Group. On the average, she has devoted about 100 hours a year to her civic activities during the past 13 years (Morgan, Ex. #1).

32. Ms. Morgan does not claim past broadcast experience.

Auxiliary Power

33. Ms. Morgan intends to install auxiliary power equipment at her proposed station in order to prevent an interruption of service in the event of a power failure (Morgan, Ex. #1).

CONCLUSIONS OF LAW

Edward F. and Pamela J. Levine

Diversification

34. Questions have been raised by opposing applicants as to the effectiveness of the Levines' divestiture pledge. As noted above, the Levines presently have a cognizable interest in WKLL, FM, Frankford, New York, and also serve, in the case of Mr. Levine, as President of the licensee of WKLL, FM, and Mrs. Levine, as Secretary/Treasurer. Their timely filed diversification statement describes this current interest, and then goes on to state that the Levines will divest themselves of ". . . that interest in accordance with the divestiture commitment contained in their application." The Levines stated therein, after identifying their present media interest, that they will ". . . divest all present and proposed attributable interests in other media properties should the instant application be granted in a comparative hearing" (Ex. #2, Levines' Form FCC 301, filed May 14, 1990). The Levines only media interest at the time was their 100 percent ownership of Station WKLL (FM), Frankford, New York. The divestiture commitment could, therefore, have only been referring to that interest, since one does not need to indicate a willingness to divest an interest not presently held. Whatever ambiguity the word "other", as set forth in this commitment, may have is removed with this understanding. The Presiding Judge concludes, therefore, that there is no meaningful difference between the diversification commitment set forth in the Levines' application and that in its integration and diversification statement filed in this proceeding.

35. Although no specific reference is made in their divestiture pledge to the Levines resigning their corporate offices with WKLL (FM), it would appear that these positions would fall under the general reference in the divestiture commitment to all present and proposed attributable media interests. Furthermore, it is highly unlikely that any future owner of WKLL (FM) would permit the Levines to continue to occupy positions of corporate responsibility, even if the Levines were so disposed. Similarly, the Presiding Judge finds no merit in the argument that the divestiture commitment is not effective because it is contingent on the award of the permit to the Levines in a comparative proceeding. The fact remains that the Levines' divestiture commitment is being evaluated in the context of a comparative hearing. Whether or not a grant to the Levines of the permit for the Endwell, New York facility pursuant to an overall settlement would require a divestiture of this media interest is, therefore, purely speculative, since any grant to the Levines in this proceeding will require that they meet their pledge to divest their existing FM station. Accordingly, the Presiding Judge finds that the Levines' divestiture commitment effectively shields them from any diversification demerit for their interest and associations with Station WKLL (FM), Frankford, New York.

Best Practicable Service

36. The Levines propose a 100 percent integration of ownership into management. Mr. Levine will serve as the proposed station's full-time General Manager, working a minimum of 40 hours a week, and Mrs. Levine has made a similar full-time pledge to work as the station's Station Manager and General Sales Manager. There is no evidence of record which calls into question the sincerity of either commitment or their ability to meet their designated responsibilities at the station. Both Mr. and Mrs. Levine have prior broadcast experience of the sort which would entitle their integration pledge to qualitative enhancement. In addition, both have indicated that they will move to the city of license in the event that their application is granted, commitments which entitle their integration proposal to further qualitative enhancement.

37. Mr. and Mrs. Levine do not claim a minority preference, local residence, or involvement in the civic affairs of the community to be served by their proposal.

Auxiliary Power

38. The Levines are entitled to additional comparative credit for their proposal to install an auxiliary power source at their station.

Maurice F. A. Battisti

Diversification

39. Mr. Battisti has no interests in any medium of mass communications.

Practicable Service

40. Mr. Battisti is entitled to a 100 percent quantitative integration credit based on his proposal to serve as the station's full-time General Manager. In addition, Mr. Battisti has lived within the service area of his proposed station for 47 years. His integration pledge is, therefore, entitled to be qualitatively enhanced for his long term residence within the service area. Mr. Battisti does not claim a minority preference or past broadcast experience of the type entitled to consideration under the standard comparative issue.

41. Mr. Battisti asks that the Presiding Judge take official notice that his home town of Endicott, New York is contiguous to Endwell, New York. The request will be denied. The Presiding judge issued a specific directive that official notice will not serve as a substitute for the actual introduction of evidence which would support his claim of the alleged contiguity. Mr. Battisti failed to offer such evidence. In any case, official notice would not be appropriate here since Mr. Battisti has not shown that the alleged contiguity is capable of accurate and ready determination by reference to sources whose accuracy cannot reasonably be questioned. *See* Fed. R. Evid. 201(b). In fact, Mr. Battisti has not supported his claim of alleged contiguity with any type of information, much less with information not subject to reasonable dispute. Finally, even if official notice was appropriate in this instance, and the two communities were, in fact, contiguous, comparative credit could not be awarded to Mr. Battisti for this contiguity, since to do so, at this time, would amount to an impermissible comparative upgrade.

42. As part of his direct case, Mr. Battisti lists a number of civic organizations with which he has been involved and, in some cases, has held positions of responsibility. Although he claims credit for these activities, he failed to state that they occurred within the service area of the proposed station. In addition, he does not indicate the amount of time he devoted to any one or all of these alleged activities. Mr. Battisti had the burden of showing the relevance of these claimed activities to the standard comparative issue, as well as the extent of his involvement in these activities. His failure to do so precludes any qualitative enhancement of his local residence credit for civic involvement within the predicted service area.

Auxiliary Power

43. Mr. Battisti's application is entitled to further qualitative enhancement for his proposal to install an auxiliary power source at his proposed station.

Mary C. Murray

Diversification

44. Ms. Murray has no interest in any medium of mass communications.

Best Practicable Service

45. Ms. Murray was repeatedly questioned, during the course of her cross-examination, as to those duties which she intended to assume at her proposed station. This extensive cross-examination was occasioned by what is claimed are inconsistencies between her deposition testimony and her direct testimony as to the scope of her duties at the proposed station. It is argued by opposing applicants that Ms. Murray, in her direct testimony, repudiated her testimony at deposition regarding the functions of her technical director (Tr. 249-50), her Sales Manager (Tr. 275), and sales personnel. In addition, it is claimed that her deposition testimony raises questions as to whether or not she would hire a receptionist (Tr. 168-70) and a secretary (Tr. 195), or perform those duties herself, and whether or

not she would keep the books for the station (Tr. 210-11) as well as perform the station's traffic department functions (Tr. 213). They submit that Ms. Murray sought, in her direct case and at the hearing, to distance herself from her earlier testimony which, they contend, clearly shows that she proposes to be involved extensively in non-managerial duties at the station which would preclude a meaningful, full-time management role at the station. They submit that Ms. Murray's belated attempt at the hearing to distance herself from this prior testimony must be rejected, and that her proposed performance at the station of a number of duties which are clearly non-managerial, makes it clear that she will not spend 40 hours or more a week at the station in a managerial role. Accordingly, they submit that Ms. Murray is not entitled to a full- time integration credit based on this record, since she has failed to put forth an integration proposal which is realistic and capable of effectuation.

46. Ms. Murray, according to her testimony, has been interested in owning a radio station since the 1950's (Murray, Ex. #1), and in the past assisted her late husband in his duties at a radio station. The record further demonstrates that Ms. Murray has not only shown an interest in broadcasting but has also actively prosecuted her application for the Endwell, New York facility. Ms. Murray retained communications counsel and the application's engineer (Murray, Ex. #1). She also contacted the owner of her proposed antenna site and arranged for the station's financing (Murray, Ex. #1). In addition, Ms. Murray worked with counsel in completing the application form as well as the station's budget and, together with her counsel, addressed certain matters raised during the course of litigation (Murray, Ex. #1). Ms. Murray also established the required public inspection file which she keeps current, and arranged for the publication of public notices regarding the filing of her application and the designation of her application for comparative hearing (Murray, Ex. #1). Ms. Murray is also the contact person with respect to her application, and she alone pays the applicant's bills (Murray, Ex. #1). It is apparent, therefore, on the basis of this record, that Ms. Murray has played a significant role in prosecuting her application, and there is no reason to believe that she would not assume a similar degree of responsibility with respect to the running of her proposed station.

47. Ms. Murray would be the sole owner and General Manager of the Endwell, New York station. As such, it is reasonable to conclude that she will be actively involved in managerial functions at the station for 40 or more hours a week at the very least, and will also have ultimate responsibility for making sure that the station's policies are carried out. Although she may, from time to time, perform duties which are not necessarily managerial, that fact alone does not negate her claim of full-time integration in a position at the station with managerial responsibility. As the Review Board of this Commission noted in a recent decision, *Helen Broadcasters, Inc.*, FCC 92R-29, released April 21, 1992, "although [the integrated principal's] testimony also shows that he will perform numerous non-managerial tasks simultaneously with his managerial duties, such a blend of activities is a realistic mix for a General Manager of a fledgling radio station . . . ".

48. The Presiding Judge was impressed at the hearing with Ms. Murray's commitment to and enthusiasm for this project. The fact that as of the date of her deposition she may not have formulated, with precision, her staffing requirements or those duties to be performed by specific employees at the station, does not appear significant to the Undersigned. The evidence of record demonstrates that Ms. Murray has now a more precise idea of how the station will be run. The Presiding Judge finds, therefore, that Ms. Murray's integration proposal is credible, and she will be awarded a 100 percent quantitative integration credit which is qualitatively enhanced by her long-term local residence within the service area of her proposed station, with some civic involvement.

Auxiliary Power

49. Ms. Murray is entitled to a further comparative credit for her proposal to install an auxiliary power source at her proposed station.

Carol A. Morgan

Diversification

50. Ms. Morgan has no interest of any kind in any medium of mass communications.

Best Practicable Service

51. There is no evidence of record which calls into question the sincerity of Ms. Morgan's integration commitment, or her ability to fulfill her pledge. Accordingly, Ms. Morgan will receive a 100 percent quantitative integration credit for her proposal to be integrated on a full-time basis into the management of the station. This quantitative integration credit is qualitatively enhanced by her residence within the service area of her proposed station with some civic involvement and by her intention to relocate to the city of license in the event that her application is granted. Ms. Morgan does not claim minority status or past broadcast experience.

Auxiliary Power

52. Ms. Morgan's proposal to install auxiliary power equipment at her proposed station in order to prevent an interruption of service in the event of a power outage entitles her application to further comparative credit.

ULTIMATE CONCLUSIONS

53. As found above, all four applicants are entitled to a 100 percent quantitative integration credit for their proposals to integrate 100 percent of their ownership on a full-time basis into management positions at their proposed stations, and none of the applications are subject to a diversification demerit. The decision as to which proposal would best serve the public interest, therefore, will turn on a consideration of the qualitative enhancements to which each application is entitled.

54. The application of the Levines is the only one not entitled to a credit for service area residence. Accordingly, the application of the Levines is found to be comparatively inferior to the other three applications, and it will be given no further consideration.

55. Of the three remaining applicants, all three principals have lived within their proposed service areas for significant periods of time. Ms. Morgan, a 17 year resident, has lived within the service area for the shortest period of time. Mr. Battisti has been a resident of this proposed service area for 47 years and Ms. Murray for 57 years. Ms.

Murray, although she has resided within the service area the longest, did not pledge to remain a resident of the service area. Ms. Murray's failure to so indicate, renders her proposal inferior to that of Ms. Morgan and Mr. Battisti, both of whom are pledged to continue to reside within their respective service areas. Ms. Morgan, although she has lived within the service area for the shortest period of time, is committed to move to the city of license in the event that she is the successful applicant, whereas Mr. Battisti has indicated that he will not but will continue to reside within the service area.

56. Although Mr. Battisti has lived within the service area for a significantly longer period of time than Ms. Morgan, her 17 year residence within the service area cannot be considered inconsequential. Whatever slight, additional credit Mr. Battisti would be entitled to for his longer period of residence within the proposed service area is outweighed by Ms. Morgan's commitment to move to the city of license, in the event that she is the successful applicant, and her additional credit for active involvement in the civic affairs of her community.

Accordingly, the Presiding Judge finds that Ms. Morgan's application is comparatively superior to Mr. Battisti's, Ms. Murray's and the Levines', and her application will be granted and those of her competitors denied.

RULINGS

IT IS ORDERED that, for good cause shown, the Motion to Strike filed by Carol A. Morgan and Edward F. and Pamela J. Levine on March 11, 1992 IS GRANTED, and Exhibit I to the March 9, 1992 Reply Findings of Fact and Conclusions of Law of Maurice F. A. Battisti IS STRICKEN.

And IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Carol A. Morgan (File No. BPH-900516MU) for authority to construct a new FM station on Channel 298A in Endwell, New York IS GRANTED; and that the applications of Edward F. and Pamela J. Levine (File No. BPH-900514MM), Maurice F. A. Battisti (File No. BPH-900515ME), and Mary C. Murray (File No. BPH-900516MT) ARE DENIED.[3]

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTES

[1] Virginia Caldwell Kozlowski (File No. BPH-900514MN), Lois W. O'Connor (File No. BPH-900515MG), Great Scott Broadcasting (File No. BPH-900516ML), and Allswell Broadcasting, Inc. (File No. BPH-900516MP), by *Order*, FCC 91M-2989 (released October 4, 1991), JB Communications (File No. BPH-900516MO), by *Order*, FCC 91M-3466 (released December 18, 1991.

[2] An additional issue was designated against an applicant which is no longer a party to this proceeding. In the interests of brevity, it is being omitted.

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-153

In re Applications of

SOUND BROADCASTING CO. File No. BPH-880126ML

MARGARET O. PESCATELLO File No. BPH-8801260E

For Construction Permit
for a New FM Station
in East Lyme, Connecticut

Appearances

David Tillotson on behalf of Sound Broadcasting Co., *Jerrold Miller* and *Samuel Miller* on behalf of Margaret O. Pescatello, and *Larry A. Miller* on behalf of the Mass Media Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: June 17, 1992; Released: June 25, 1992

PRELIMINARY STATEMENT

1. By the Review Board's order, *Memorandum Opinion and Order* (FCC 91R-51), released on June 24, 1992, this proceeding was remanded to the undersigned for consideration of the following issues:

(1) To determine whether Sound Broadcasting Co. is financially qualified to construct and operate its proposed station; and

(2) To determine whether Anthony Pescatello is a real party-in-interest in the application of Margaret O. Pescatello and the effect thereof on the qualifications of that applicant to be a Commission licensee.[1]

2. The Review Board, in the same order, reinstated the application of Sound Broadcasting Co. which had been dismissed by the Presiding Judge for failure to prosecute by *Memorandum Opinion and Order*, FCC 91M-1022, released March 21, 1991.

3. After the proceeding was remanded to the Presiding Judge, the remaining applicants reached a settlement agreement which contemplates the dismissal of Sound's application in return for payment by Mrs. Pescatello in an amount not to exceed $110,000 as reimbursement for Sound's legitimate and prudent expenses, and a grant of the Pescatello application. Because the Bureau believed that Sound, which sought the real party-in-interest issue against Mrs. Pescatello, would not vigorously prosecute that issue in light of the pending settlement agreement, a view shared by the Presiding Judge, the Bureau agreed to assume the duty of cross-examining the witnesses and offering evidence on this issue. Consideration of the joint request for approval of the pending settlement agreement must await action on the pending qualifying issue against Mrs. Pescatello's application.

4. The remand hearing was held on February 11 - 13, 1992, in a courtroom in Washington, D.C. The record was closed on February 13, 1992, and Proposed Findings of Fact and Conclusions of Law were filed by Margaret O. Pescatello and the Mass Media Bureau, and Contingent Proposed Findings of Fact and Conclusions of Law by Sound. Mrs. Pescatello, alone, filed Reply Findings.

FINDINGS OF FACT

5. Anthony Pescatello first learned of the East Lyme, Connecticut FM allotment in 1985 (Tr. 77-78, 245). He subsequently made several inquiries about the possibility of applying for the station, including contacting a broadcast consultant, Michael Rice (Tr. 100, 245-46, 325-36). He then, along with Mr. Rice and a consulting engineer, searched for a suitable transmitter site for the proposed station (Pescatello Remand, ¶ 3; Tr. 152, 248, 260) and secured such a site. While this process was on going, Mr. Pescatello, with Mr. Rice's assistance (Tr. 100, 251-52), purchased an existing radio station in 1987 and worked full-time at the station, devoting approximately 50 to 60 hours a week to his duties at the station. During the summer of 1987, Mrs. Pescatello began working at the newly acquired AM station, and it was during this period of time that she developed an interest in broadcasting (Tr. 87-88, 91, 276). At the same time, Mr. Pescatello, who was spending more and more of his time on matters affecting his station, became less interested in pursuing the East Lyme application (Tr. 274-76). Mrs. Pescatello meanwhile informed her husband of her growing interest in broadcasting, and he suggested that she meet with his broadcast consultant to discuss the possibility of filing for the application and that she might discuss with him any concerns she might have about pursuing such a venture (Tr. 277).

6. The Pescatellos did, in fact, meet with Mr. Rice (Tr. 83, 85, 114, 370), and, according to the evidence of record, Mrs. Pescatello took charge of the meeting, and asked Mr. Rice a number of questions with respect to the application process (Tr. 371-72, 339). Mr. Rice, in turn, advised her on the mechanics of pursuing an application before the Commission (Tr. 84-85, 115-17, 341, 212), and a day or two after the meeting, he was informed by Mrs. Pescatello that she would be applying for the East Lyme facility in her own name (Tr. 115-16, 227).

7. Mr. Rice prepared the legal portion of Mrs. Pescatello's application with her assistance (Tr. 349-52). Prior to the actual filing of the application, Mrs. Pescatello revised the station's budget prepared by Mr. Rice (Tr. 93-94, Mass Media Bureau, Ex. #9), making changes in the station's projected costs, based on her experience at the AM station. These changes were not discussed with Mr. Pescatello (Tr. 114, 200). Mrs. Pescatello's engineer mailed his report to Mr. Rice who in turn sent the completed application to Mrs. Pescatello for her review and signature (Tr. 352). She then mailed the executed, original application to her attorney for submission to the FCC (Tr. 117). Mrs. Pescatello also established the public inspection file,

and she arranged for publication of the local notice of the filing of her application (Tr. 233-36). These steps were taken without the assistance of her husband (Tr. 234).

8. In April 1988, Mrs. Pescatello prepared an amendment to her application which she directed counsel to file, advising the Commission that she and her husband would divest their ownership interest in the existing radio station if she secured the East Lyme, Connecticut facility, and that the proposed station at East Lyme would install an auxiliary power source (Tr. 234-35). Since the filing of the application, Mrs. Pescatello has paid most of the expenses associated with the application from her own personal account (Pescatello Remand, Ex. #4, p. 3; Tr. 149) with at least 23 checks drawn on that account (Pescatello Remand, Ex. #7; Tr. 149, 165-66, 224-25), and she also paid the hearing fee with her own funds (Tr. 160). Since the filing of the application, Mr. Pescatello did pay a few small bills, totaling $500 to $600, to Mr. Rice for his services in helping to locate a potential alternative transmitter site (Mass Media Bureau, Ex. #10; Tr. 214-15, 124). According to her testimony, she left Mr. Rice's bills for Mr. Pescatello and her son to review, since they had had contact with Mr. Rice regarding possible transmitter sites. Mr. Pescatello indicated that he paid these bills without giving the matter much thought (Tr. 296).

9. Mrs. Pescatello met with Sound to discuss the possibility of settling this matter on four separate occasions (Tr. 180). During the course of each of these separate sessions, Mrs. Pescatello handled the negotiations (Tr. 176-77). Although Mr. Pescatello was present at two of the four meetings, he did not participate in the discussions (Tr. 293-94). The eventual settlement agreement, which has been presented for approval, was negotiated by Mrs. Pescatello, and she did not seek her husband's advice as to whether or not she should enter into the agreement (Tr. 187). The terms of the proposed agreement were discussed with her husband. However, he did not recommend the terms of the agreement (Tr. 182-85, 294-95). Mrs. Pescatello relied, instead, on the advice of counsel (Tr. 180).

10. After reaching a settlement agreement with Sound, Mrs. Pescatello met on three separate occasions with representatives of New England Savings Bank to arrange for back up or supplemental funding for the proposed station (Tr. 168-69). Although Mr. Pescatello was present at the first meeting with the bank official, he merely listened and was not an active participant (Tr. 168, 290-91). The January 1992 Bank letter obtained by Mrs. Pescatello was secured by the assets of the FM station and her rental properties (Mass Media Bureau, Ex. #5; Tr. 170-71). There was no discussion with the lending institution or requirement by the bank that Mr. Pescatello provide his personal guarantee for the loan (Tr. 172).

CONCLUSIONS OF LAW

11. Mr. Pescatello testified that he has no plans to work at the proposed station since he wants to go into semi-retirement and pursue his real estate and other business interests (Tr. 222, 299). Although he will serve as a sounding board for his wife, he fully expects that she will make the decisions regarding the station (Tr. 302). Mrs. Pescatello believes that she is qualified to manage the station's affairs, without any direction from her husband (Tr. 223), a view shared by Mr. Rice who feels that Mrs. Pescatello is a serious, independent person who is committed to building and operating the proposed station.

12. The Presiding Judge concludes that the reasons given by Mr. Pescatello for abandoning the project and by Mrs. Pescatello for assuming the ownership and management of the venture are totally credible. Mr. Pescatello was the one who was initially interested in the project, after he had abandoned his previous employment with a Bank and was looking for a new career. While still investigating the possibility of applying for the new facility in East Lyme, he decided to buy an existing station. As his duties at the station became more and more time consuming, he became less interested in pursuing the East Lyme application, and Mrs. Pescatello became more and more interested in broadcasting herself. Although she is the sole owner, her husband and son aided her in minor ways with the application process. She, however, continued to be actively involved in furthering the project, performing a number of activities independently of her husband. The record shows that Mr. Pescatello's active participation in the process occurred early on, and since the filing of her application, he has, in his own words, acted merely as a sounding board. Whatever participation in the process he had after the filing of the application flowed necessarily from the work that he had performed earlier.

13. The Presiding Judge found Mrs. Pescatello, in fact all of the persons presented for cross examination, to be credible. Mrs. Pescatello is an articulate woman who has been employed as a school teacher for many years and in the past worked for a short period of time at a radio station owned jointly with her husband. In addition, she manages rental properties which she owns in her own name, and has demonstrated an independence, both in her past business dealings as well as in her activities performed in furthering this application, which removes any doubt that she will act independently of her husband, in the event that she is the licensee for the East Lyme station, and that she will be in complete control of the operations of the proposed station.

14. The Presiding Judge concludes, therefore, that Mrs. Pescatello has demonstrated an independence of thought and a pattern of financial independence which is a clear indication that she will be in control of her station, rendering credible her claim that her husband does not have an undisclosed interest in the venture. The real party-in-interest issue will be and is resolved in Mrs. Pescatello's favor. *So ordered.*

JOINT SETTLEMENT AGREEMENT

15. The sole qualifying issue still pending having been resolved in Mrs. Pescatello's favor, we are now in a position to consider the merits of the joint settlement agreement.

16. Applicants seek approval of a joint settlement agreement which provides, in pertinent part, for the dismissal of Sound's application in return for a cash payment from Mrs. Pescatello to Sound not to exceed $110,000 as reimbursement for its legitimate and prudent expenses incurred in the preparation and prosecution of its application.

17. The Presiding Judge finds that the parties are in substantial compliance with the requirements of Section 73.3525 of the Commission's Rules. In addition, the parties to the agreement have filed appropriate declarations

stating that their respective applications were not filed for the purpose of entering into a settlement agreement, and that the only consideration paid or promised for the dismissal of Sound's application is that specified in the settlement agreement.

18. The Presiding Judge finds good cause for approving the settlement agreement since it will permit a grant of Mrs. Pescatello's application without further consideration of the comparative merits of the two applications, thereby resulting in the earlier institution of a new FM radio service to East Lyme, Connecticut. Accordingly, the joint request will be granted, the settlement agreement approved and the application of Sound dismissed with prejudice and that of Mrs. Pescatello granted.

RULINGS

IT IS ORDERED that the Petition to Enlarge Issues filed by Margaret O. Pescatello on August 30, 1991 IS DISMISSED as moot.

AND IT IS FURTHER ORDERED that the Joint Request for Approval of Settlement Agreement filed by Margaret O. Pescatello and Sound Broadcasting, A Partnership on October 11, 1991, as supplemented on October 16, 1991, October 25, 1991 and November 12, 1991, IS GRANTED and the settlement agreement IS APPROVED; the application of Sound Broadcasting, A Partnership (File No. BPH-880126ML) IS DISMISSED with prejudice; and that the application of Margaret O. Pescatello for a construction permit for a new FM station (File No. BPH-880126OE) in East Lyme, Connecticut IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTE

[1] The financial qualifications issue designated against Sound was resolved in its favor by a ruling entered on the record in this proceeding on February 11, 1992. *See Order*, FCC 92M-217, released February 20, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-357

In re Applications of

PALMETTO COMMUNICATIONS COMPANY — File No. BP-870331BK
WDIX, Yadkinville, North Carolina

For a Construction Permit
For a Modification of Facilities

TRIAD NETWORK, INC. — File No. BP-870928AA
Greensboro, North Carolina

For a Construction Permit
for a New AM Station

Appearances

Peter Gutmann on behalf of Palmetto Communications Company; *Stephen T. Yelverton* on behalf of Triad Network, Inc.; *Gary S. Smithwick* on behalf of Robert Carroll Rickenbacker, Jr.; and *Charles E. Dziedzic* and *Larry A. Miller* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: June 18, 1992; Released: June 26, 1992

By the Review Board: MARINO (Chairman) and BLUMENTHAL. Board Member ESBENSEN absent.

1. The Board has before it the *Supplemental Initial Decision* (*S. I. D.*), 7 FCC Rcd 1611 (1992), of Administrative Law Judge Edward J. Kuhlmann (ALJ) in the above-captioned case. It also has the exceptions of Robert C. Rickenbacker, Jr.; the "limited" exceptions of Triad Network; a reply to Rickenbacker's exceptions from the Commission's Mass Media Bureau; and the "partial" reply of Palmetto Communications.[1]

2. The *S. I. D.* concluded that Palmetto Communications failed to notify the Commission of a significant ownership change, and that it "withheld information and misrepresented facts" about its ownership during the course of this proceeding. It therefore found Palmetto not qualified. *Id.*, paras. 19 *et seq.* Palmetto has filed no exceptions, either with respect to its own disqualification or to the grant of the Construction Permit to Triad. Rather, the pleadings before us are directed toward subsidiary conclusions that do not relate to, or effect, the award of the permit.

3. Thus, Rickenbacker, a (reported) 50% Palmetto partner who was afforded separate party status in the wake of a remand to the ALJ,[2] excepts to the *S. I. D.* 's view that he was, at least at the outset, a major Palmetto principal with a duty to timely report his (alleged) withdrawal as an equal partner.[3] Rickenbacker also protests the *S. I. D's* conclusion that he misrepresented that he had never "consummated" a partnership agreement with William R. Hallman, the other Palmetto "partner." Rickenbacker seeks reversal of the *S. I. D.* on these points and a Board determination "that he is qualified to be a Commission licensee."[4]

4. The Mass Media Bureau disagrees, and its reply pleading asserts that "[t]he *S. I. D.* correctly concluded that a partnership existed between Hallman and Rickenbacker";[5] that even if Rickenbacker believed that he had "withdrawn" from Palmetto, he had a duty to timely report that fact to the Commission;[6] that Rickenbacker's letter of February 27, 1991 (*see supra* note 3) "was inaccurate and very misleading" to the extent that Rickenbacker claimed "that he never had an ownership interest in [Palmetto's] WDIX";[7] and, hence, that "Rickenbacker's misrepresentations to the Commission indicate that he lacks the essential trait of truthfulness which the Commission requires of its licensees."[8]

5. For its part, and while *not* excepting to the grant of the permit to Triad,[9] Palmetto objects to that portion of Rickenbacker's exceptions that urge the disqualification of Palmetto's counsel. It claims that its representation of Palmetto -- as a Hallman/Rickenbacker partnership -- was "effectively ordered" by the ALJ, until a resolution of the "ownership" question at the remand hearing.[10]

DISCUSSION

6. We start with the obvious observation that *no* party to this case excepts to the award of the permit to Triad. Instead, the parties continue to argue (1) the question of whether Rickenbacker was ever a 50% Palmetto partner and whether he had a duty to report his (alleged) 1989 withdrawal from the partnership; and (2) which, if any, of the attorneys involved in this case should have been disqualified for maintaining a conflict of interest.[11]

7. As to the first matter, and while the Board did afford Rickenbacker separate party status because of his claims adverse to Palmetto, and *vice versa*, we find that no useful purpose would be served in further protracting this now uncontested licensing proceeding by speculating at length over whether Rickenbacker ever formally "consummated" his Palmetto partnership agreement with Hallman. As our remand order signaled, our focus was not upon the vicissitudes of state contract law, but upon *Palmetto's* failure to report a 50% ownership change, alleged or otherwise. *See* 6 FCC Rcd at 2194-95. In that regard, we agree with the Mass Media Bureau that, being fully aware of his written agreement to purchase WDIX and of his application to the FCC to purchase that station as a 50% partner in Palmetto, Rickenbacker had an inalienable duty to report his (alleged) withdrawal as soon as *he* believed he was no longer an applicant principal in this case. Because, as the Mass Media Bureau observes, "any decision on Rickenbacker's qualifications will apply only if he seeks to become a Commission licensee,"[12] we will however vacate the *S. I. D.* 's conclusions of law as to his basic qualifications, but will not disturb the ALJ's findings of fact for the reasons best expressed by the Commission in *ASD Answer Service, Inc.*, 1 FCC Rcd 753, 756 (1986). There stating that it would not resolve lingering questions "unless they are necessary to our statutory mandate" merely because certain "principals are unhappy" that the resolution of the

underlying case "fail[ed] to exonerate them," the Commission vacated the conclusions of law but did not disturb the ALJ's findings of fact so as to avert, if ever pertinent, a duplicative rehearing on the ambient facts. Apart from the ALJ's finding here that Rickenbacker was, at least for a time, a Palmetto partner, the findings of fact of the *S. I. D.* are unchallenged in any material way; it is, instead, the ALJ's inferences and conclusions that Rickenbacker chiefly attacks. We, thus, agree with the Bureau insofar as it contends that Rickenbacker's conduct in this proceeding can be examined under the tenets of the *Policy Regarding Character Qualifications*, 102 FCC 2d 1179 (1986),[13] if *and if ever* Rickenbacker should apply for a permit or license. *Cf. Allegan County Broadcasters, Inc.*, 83 FCC 2d 371, 373 (1987)(unresolved character issues "can be revisited in a future proceeding should the applicant again seek to obtain a Commission license").[14]

8. As to Palmetto's reply requesting a determination on Rickenbacker's exceptions with respect to the conduct of Palmetto's counsel, we point, first, to footnote 11 of our margin wherein we refused to address matters not relating to a claim of error in the *S. I. D.* ; and, second, to *Scioto Broadcasters*, 5 FCC Rcd 5158, 5161-62, (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 1893 (1991), where we held that we would not pass judgment on questions of attorney ethics, unless these questions were vital to the maintenance of record untainted with serious prejudice, so as to require a hearing *de novo*.[15] As Palmetto does not except to the S.I.D. on the merits of the case, and its running dispute with Triad's counsel is wholly extraneous to our delegated function, we leave its "reply" pleading as we find it.

9. ACCORDINGLY, IT IS ORDERED, That the Conclusions of the *Supplemental Initial Decision*, FCC Rcd 1611 (ALJ 1991), ARE VACATED to the extent indicated in paragraph seven above; and

10. IT IS FURTHER ORDERED, That the application of Triad Network, Inc. (File No. BP-870928AA) for a Construction Permit for a New AM Broadcast Station at Greensboro, North Carolina, IS GRANTED, and the application of Palmetto Communications Company (File No. BP-870331BK) for Modification of Facilities of Standard Station WDIX, Yadkinville, North Carolina IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Triad also filed, on April 21, 1992, a "Statement For The Record." This unauthorized pleading is dismissed.

[2] *See Palmetto Communications Co.*, 6 FCC Rcd 5023 (Rev. Bd. 1991).

[3] Rickenbacker himself triggered the remand hearing when, after the release of our original *Decision*, 6 FCC Rcd 1527 (Rev. Bd. 1991), he supplied Triad with a letter of February 27, 1991 that averred that he was *not* Palmetto's 50% owner, as represented in Palmetto's instant application and at all pertinent times thereafter. *See Memorandum Opinion and Order*, 6 FCC Rcd 2193 (Rev. Bd. 1991).

[4] Rickenbacker Exceptions at 17.

[5] Bureau Reply at 4.

[6] *See id.*, at 6.

[7] *Id.* It is undisputed that: (1) "On August 23, 1989, Hallman and Rickenbacker signed a sales agreement" to purchase WDIX, *S.I.D.*, para. 5; (2) Rickenbacker concedes that "he filed as a general partner of Palmetto [in] an application for assignment of the license of WDIX" to Palmetto; but that (3) he did not notify the Commission until after the Board's *Decision* of his surprise claim that he was not a 50% Palmetto partner. Rickenbacker Exceptions at 3.

[8] Bureau Reply at 6-7.

[9] Palmetto Partial Reply at 1 n.1.

[10] *See id.*, at 3-4.

[11] *See id., passim. See also* Triad "Limited Exceptions" at 10, seeking resolution "in favor of Triad's counsel" of a point raised in the Board's 1991 remand order (*see* 6 FCC Rcd at 2195 n.7). Triad's "exception" does not pertain to the *S.I.D*; indeed, Triad's "Limited Exceptions" (at 10) state that neither the parties nor the ALJ "pursued this matter at hearing." We will not address this matter further. 47 CFR § 1.277(a) (exceptions shall be directed to "alleged material errors" in the Initial Decision).

[12] Bureau Reply at 6.

[13] Thus, and consistent with our vacation of the *S.I.D.'s* conclusions of law, no final determination is made as to Rickenbacker's basic qualifications, a matter which will, if ever necessary, be analyzed more fully under *Character Qualifications*, *see* 102 FCC 2d at 1227-29.

[14] *See also LA STAR Cellular Telephone Co.*, FCC 92-243, released June 15, 1992 at n.3, where the Commission dismissed as moot exceptions directed to an ALJ's determination that applicant principals lacked candor at hearing, because:

> Questions regarding the conduct of [applicant principals] in this case may be revisited in light of the relevant findings and conclusions here in future proceedings where the other interests of these parties have decisional significance. *See Character Qualifications*, 102 FCC 2d 1179, 1123-24 para. 92 (1986), *recon. denied*, 1 FCC Rcd 421 (1986).

[15] *Compare Palmetto Communications Co.*, 7 FCC Rcd 676 (1992) (apparent conflict of interest of Triad counsel, Stephen T. Yelverton, *until* he withdrew his simultaneous representation of Rickenbacker *and* Triad).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,
Complainant,

v. File No. E-92-15

PACIFIC BELL TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: June 19, 1992; Released: June 26, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On November 20, 1991, American Telephone and Telegraph Company filed with the Commission the above-captioned formal complaint seeking recovery of damages for Pacific Bell Telephone Company's alleged overearnings on interstate access charges for the period January 1, 1989, through December 31, 1990. On June 11, 1992, the parties filed a joint motion requesting the Commission to enter an order dismissing the complaint with prejudice. In support of their motion, the parties state that all claims in the action against the defendant have been settled. The parties also state that no purpose would be served by the continuing pendency of this proceeding.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Metropolitan Fiber Systems of
Minneapolis/St. Paul, Inc.
Complainant,

v. File No. E-89-342

Northwestern Bell
Telephone Company,
Defendant.

ORDER

Adopted: June 18, 1992; Released: June 26, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 7, 1989, Metropolitan Fiber Systems of Minneapolis/St. Paul, Inc. ("MFS") filed a formal complaint against Northwestern Bell Telephone Company ("NWB"), predecessor of U S West Communications, Inc. ("USWC"), alleging that NWB had violated Sections 201(b) and 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201(b) and 202(a). USWC filed an answer in which it denied the allegations along with a motion to dismiss the complaint. After further pleadings and discovery, the parties entered into settlement negotiations. On June 5, 1992, the parties filed a joint motion requesting that the Commission dismiss the complaint with prejudice. The parties stated that all issues raised by the complaint have been settled and that all pending motions have been rendered moot.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the parties' joint motion to dismiss with prejudice IS GRANTED and the the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications,
Complainant,

v. File No. E-88-21S

Northwestern Bell
Telephone Company,
Defendant.

ORDER

Adopted: June 22, 1992; Released: June 23, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. This is a ruling on a motion filed by Northwestern Bell Telephone Company (NWB)[1] in the above-captioned proceeding to compel AT&T Communications (AT&T) to fully respond to certain unanswered or partially answered interrogatories filed by NWB on May 21, 1992. AT&T filed its response to the interrogatories on June 5, 1992. NWB filed its Motion to Compel on June 10, 1992 (Motion).[2] For the reasons set forth below, we deny NWB's Motion.

Interrogatories 1, 2, and 3

2. In its Motion, NWB argues that the information requested in its interrogatories regarding the calculation of the amounts AT&T would have paid to MTN and PNB for interstate access charges at earned rates of return of 12.75% and 13.20% is clearly relevant. NWB contends that equity dictates that the overall rates of return of all the U S West companies is relevant in determining whether damages should be awarded to AT&T, even if such overall rates of return are not relevant in determining whether USWC or NWB overearned. NWB further argues that AT&T should be able to calculate such amounts or at least stipulate as to the amounts contrary to AT&T's assertion that such information is exclusively within the possession and control of MTN and PNB.

3. In its Opposition, AT&T argues that the requested information is irrelevant because the Commission has already ruled that AT&T's transactions with carriers other than NWB are beyond the scope of this proceeding.

4. We agree that the requested information is not relevant to the issue before us in this proceeding. AT&T's complaint is filed against NWB, not against PNB or MTN. The Commission previously ruled in the liability phase of this proceeding that

> Under the [Communications] Act, carriers have substantial flexibility in formulating rates. Indeed, our rules permit companies to choose the level of geographic aggregation for purposes of developing and tariffing their rates, as well as reporting their earnings on such rates. NWB could have chosen to develop its rates together with its affiliated U S West Companies but did not exercise its option to do so. Having chosen to file rates specifically tailored to its own revenue requirement, and thereby choosing to subject itself to a separate rate of return constraint, NWB cannot now be permitted to evade that constraint and force its customers to bear the burden of unlawful rates.[3]

Accordingly, we will deny NWB's Motion insofar as it requests information from AT&T regarding PNB and MTN.

Interrogatories 7, 8, 9, and 10

5. NWB also seeks to compel AT&T to provide it with information regarding all settlements AT&T has received for past overearnings complaints and the extent to which AT&T has taken action to pass through the settlements to its own end user customers (Interrogatories 7, 8, and 9). In addition, NWB seeks to compel AT&T to provide information regarding the extent to which AT&T intends to flow through any damages awards to its customers (Interrogatory 10). NWB contends that this information is relevant because AT&T is unjustly enriching itself if it retains the settlement amounts and AT&T's actions in these cases directly impact its equitable rights to damages or restitution.

6. AT&T did not provide the requested information regarding settlements on the grounds that such information is irrelevant, confidential and proprietary. In addition, AT&T contends that the information requested regarding the flow through of damages awards is irrelevant and that NWB's "passing through" argument has been rejected by the Supreme Court.[4]

7. We will deny NWB's Motion. NWB has not shown that the requested information regarding settlements or flow through of damages by AT&T is relevant or is reasonably calculated to lead to the discovery of admissible evidence.[5]

---

[1] NWB, The Mountain States Telephone and Telegraph Company (MTN), and Pacific Northwest Bell Telephone Company (PNB) have consolidated as U S West Communications, Inc. (USWC). *See* 5 FCC Rcd 1982 (1990).

[2] AT&T's Opposition to Northwestern Bell's Motion to Compel was filed on June 15, 1992 (Opposition). NWB filed its reply on June 19, 1992.

[3] *AT&T v. Northwestern Bell Telephone Company*, 5 FCC Rcd 143, 148 (1990) [footnotes omitted].

[4] Opposition at 6 citing *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

[5] Because we do not find the requested information to be relevant, we do not reach AT&T's claims that the requested information regarding settlements is confidential or proprietary.

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. §0.291, that NWB's Motion to Compel IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED

MM Docket No. 88-403

In re Application of

EVANSVILLE SKYWAVE, INC. File No. BPH-8704300K

For Construction Permit for
New FM Station, Channel 298A,
Evansville, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: June 11, 1992; Released: July 13, 1992

By the Review Board: MARINO (Chairman) concurring in result, and BLUMENTHAL; Board Member ESBENSEN absent.

1. *By Memorandum Opinion and Order*, 7 FCC Rcd 1699 (1992), the Commission remanded this proceeding to the Board to consider the exceptions to three ALJ designated issues not addressed specifically in our affirmation of Judge Edward A. Kuhlmann's Initial Decision which, *inter alia*, disqualified the sole remaining applicant on an initial ownership misrepresentation issue. *See Evansville Skywave, Inc.*, 6 FCC Rcd 1356 (ALJ 1991)(*I.D.*), *aff'd in pertinent part*, 6 FCC Rcd 5373 (Rev. Bd. 1991)(*Decision*).

2. In the *I.D.* reviewed by the Board, the ALJ had tried the following issues against the applicant:

> (1) To determine whether Skywave has misrepresented facts that it is a bona fide two tiered stock corporation and/or that Ms. Sondra Matthews is the real party in control of the applicant, and, if so, the effect thereof upon its basic qualifications.
>
> (2) To determine whether Skywave is financially qualified to construct and operate the proposed Evansville, Indiana FM station.
>
> (3) To determine whether Skywave has misrepresented facts or lacked candor in certifying that it is financially qualified to construct and operate the Evansville station, and if so, to determine the effect thereof upon its basic qualifications.
>
> (4) To determine whether Sondra Matthews or Leon Perkinson misrepresented facts or lacked candor in their deposition testimony and, if so, the effect thereof upon the basic qualifications of Skywave.
>
> (5) To determine in light of the evidence adduced pursuant to the foregoing issues, whether Skywave's application should be granted.

After contemplating the evidence, the ALJ could not find in favor of the applicant on any of the issues and he held:

> The Commission cannot rely on Skywave's representations made thus far; it is likely that it will not be able to do so in the future. Skywave's application for Evansville will be denied for failure to meet its burden in establishing that its representations to the Commission about its ownership and finances are reliable and truthful.

6 FCC Rcd at 1361. Because the Board firmly denied the applicant's exceptions directed to Issue 1, above, it was deemed unnecessary to further decide whether the ALJ had erred with respect to Issues 2-4,[1] since it agreed with the ALJ that Skywave was disqualified under Issue 1 for the intentional misrepresentation of its ownership structure as a *bona fide* limited partnership. *See Decision*, 6 FCC Rcd at 5375-76.[2]

3. For reasons best revealed in the Commission's *Memorandum Opinion and Order*, it rejected the ALJ's findings and conclusions under Issue 1, and the Board's subsequent affirmation thereof.[3] In so doing, however, it stated:

> Because we do not agree with the Board'sconclusion that ESI should be disqualified under the ownership misrepresentation issue, the exceptions relating to the other issues in this proceeding are no longer moot . . . . We will remand this proceeding to the Board to consider these exceptions.

7 FCC Rcd at 1701. Pursuant to that express direction, we have once again reviewed in its entirety the underlying record as well as the exceptions, and we hold as set forth below.

DISCUSSION

4. As indicated above, whereas the Commission overturned the applicant's disqualification under Issue 1, it returned for further consideration the question(s) of the applicant's conduct under Issues 2-4, those issues involving both Skywave's finances and its deposition testimony. *See* 7 FCC Rcd at 1701. We will review these matters separately.

5. *Financial Issues*. As reported in the *I.D.*, Skywave claims that its (putatively) sole "active" principal, Sondra Matthews, certified personally as to Skywave's financial qualifications based upon an April 1987 letter referencing a $400,000 loan from Bank One, Indianapolis, Indiana. *id.*, para. 16. The subject letter was signed by a senior loan officer, Anthony P. Schlichte, who testified that (1) he had never met Matthews, *id.*, para. 17; (2) "he did not examine the details of Skywave's proposal for Evansville" before he issued the letter, *id.*, at para. 34, but (3) he issued the letter nonetheless because he was "under the impression" that "most of the same individuals" who had participated with Lee Perkinson, a Skywave" passive investor,"[4] in Perkinson's mobile telephone ventures in the early 1980's were the "passive" principals of Evansville Skywave. *See* Tr. 285-291. Further, Schlichte testified as to only "a willingness to look at this financing," but would not say that Bank One had made a loan "commitment" to Skywave (Tr. 292; emphasis added):

> because we have not received the final loan application with *all of the detailed listing on who's the owners and that kind of thing*, so I don't know that I

> would characterize [the letter] as an accommodation. I think [the letter] tries to set forth that upon favorable review of financial information, we most likely would be able to loan the money to this entity.

According to the ALJ, Schlichte "could not remember what information was provided for this proposal" before he issued the letter. *I.D.* at para. 34.

6. After considering all of the evidence, the ALJ found against Skywave on Issues 2 and 3, concluding that:

> Ms. Matthews' claims that she provided financial information and estimates about the proposal to Mr. Schlichte are not corroborated by him. Mr. Schlichte's testimony was in writing and it is evident that if he could have backed Ms. Matthews up, he would have done so. Both Mr. Schlichte and Ms. Matthews were represented by the same counsel. The record reflects that Ms. Matthews certified without knowing whether the bank had actually evaluated the applicant. Ms. Matthews stated that she had never met any of the SCC stockholders except Mr. Perkinson and she has never seen any information about their ability to underwrite the loan. Again she simply performed the acts Mr. Perkinson directed her to do. She never had any basis to evaluate whether Bank One was actually providing reasonable assurance. Nevertheless, despite her lack of knowledge about how the bank made its decision and how the letter happened to be sent, she certified that the applicant was financially qualified.

I.D. at para. 37. As indicated, having squarely affirmed the *I.D.* on the designated ownership misrepresentation issue (Issue 1), the Board did not find it necessary to definitively resolve Issues 2 and 3, but it did note that the record on those issues contained significant gaps as well as apparent discrepancies in Matthews' representations regarding the underpinnings of the April 1987 bank letter. *See Decision*, 6 FCC Rcd at 5376 nn.2, 6.

7. For example, we perceived that while Schlichte testified initially that he issued a $400,000 bank loan letter on "the impression" that Skywave's (passive) investors were individuals with whom he was familiar from prior Perkinson mobile telephone dealings, he later testified that: (1) the bank had received no written loan application from Skywave; (2) the bank did not actually know, when it issued the April 1987 letter, who the owners of Skywave really were; (3) he did not know Sondra Matthews and could not recall receiving financial information about her (or her "passive investors") or the instant broadcast venture prior to sending the letter; but (4) the bank would have required personal guarantees from Matthews and all of the Skywave principals before committing to a loan.

8. Moreover, when questioned at hearing as to whether she had provided the bank with financial data about Skywave's principals and/or the broadcast venture prior to the bank's April 1987 letter and her personal financial certification of Skywave's application, Matthews replied (Tr. 217):

> Q. [Counsel] What sorts of information did you provide to Bank One?
>
> A. [Matthews] I gave him information about myself, in terms of my own financial situation, who I am. I gave him some estimates on what I thought the costs would be to construct the station; what I thought the costs would be to operate the station.
>
> Q. Was this over the telephone?
>
> A. No. I sent that information through the mail.

9. Citing *Scioto Broadcasting*, 5 FCC Rcd 5158 (Rev. Bd.1990),[5] Skywave's exceptions contend that no financial issue should have been added because[6]:

> *Scioto* teaches that in determining whether a bank letter is a mere accommodation, the Commission will consider whether the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data . . . . Skywave's financial showing comports with this standard fully.

It asserts that "Bank One's predecessor bank had years of satisfactory lending experience with the company" from which Skywave's limited partnership had been "spunoff," and that[7] Skywave's shareholders had had to submit their personal financial information to Mr. Schlichte prior to the loan and had updated their financial information periodically while the loan was outstanding.

10. In *Scioto*, the Board summarized the prior case law setting out the Commission's standards for establishing "reasonable assurance" of a "committed source of funds," and stated that it would review the following factors:

> Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F. 2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *caeteris paribus*, a loan in the stated amount would be forthcoming and that the borrower is fully familiar with, and accepts, the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of aloan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio, supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender. As noted above, where these fundamentals have been absent in recent cases, the Board has found no "reasonable assurance." *See, e.g., Rebecca Boedker, supra; Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7946 (Rev. Bd.1989). Conversely, where these fundamentals have been sat-

isfied, we have found such "reasonable assurance." *See, e.g., Colonial Communications, Inc.*, 5 FCC Rcd 1967 (Rev. Bd. 1990), *recon. denied*, FCC 90R-52, released June 25, 1990.

11. Skywave's pleadings make plain its view that its situation coincides exactly with that of the applicant in *Multi-State Communications*, based on the bank's prior relationship with Perkinson and his mobile telephone investors in the early 1980's. However, in light of Schlichte's testimony, it does not appear from this record that *Multi-State* is at all apposite to Skywave's situation. Thus, and apart from the fact that the *Multi-State* applicant was seeking from Chase Manhattan merely a $4 million dollar loan against a New York City VHF television station whereas Skywave sought a $400,000 loan on a startup Evansville FM facility, there are several other important distinctions. First, it is clear from the bank letter in Multi-State that Chase Manhattan knew precisely who that applicant's principals were and "was personally and favorably acquainted" with those listed on the application submitted to the FCC. 590 F.2d at 1118. Here, the bank did not even know "who's the owners and that kind of thing"; particularly, it did not know *Matthews*, in whose sole managerial hands this far riskier investment was (allegedly) to repose. Second, the *Multi-State* court's stated basis for overturning the Commission was its view that the ALJ had there misinterpreted the bank vice-president's hearing testimony to reflect "that the |Chase Manhattan| letter of intent was no longer operative." 590 F.2d at 1119, 1120. And, third, whereas Chase Manhattan had explicitly written of its "intent to finance Multi-State Communications," *id.* at 1118, Schlichte testified only that he was comfortable in indicating "a willingness to look at this financing." Tr. 288 (emphasis added), and he seems very carefully to have avoided evincing any "intent" to make a loan for lack of any vital financing information in its support. *See* Tr. 292.

12. In key respects, and on the record before us, Skywave appears to resemble not Multi-State but the disqualified applicant (Sunshine Television 27, Inc.) in *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 5751 (1990). There, the disqualified applicant claimed close familiarity between several of its shareholders and Sun Bank; and it certified its finances based on a brief telephone call from one principal to an acquaintance at the bank, and the bank official's alleged willingness to consider a formal application after it had reviewed the FCC application and the financial statements of the applicant's principals. The *Marlin* Board held:

> As is plain from the letter actually provided to Sunshine, the bank was willing only to invite aformal application, accompanied by the ordinary supporting financial statements from the principals. Sunshine never supplied these critical documents to the bank, so the bank, quite naturally, could not respond with "reasonable assurance" in the absence of the vital loan data from the Sunshine principals. *See Dutchess Communications, supra*, 101 FCC 2d at 244-249. *Compare also Chapman Radio & Television Co.*, 70FCC 2d 2063, 2072 (1979) (omission of collateral requirement vitiates reasonable assurance of a loan) with *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978).

4 FCC Rcd at 7947. Upon review, the full Commission affirmed, stating:

> Sunshine did not have such assurance when it certified its financial qualifications on March 19, 1985. *At the time of certification, Sunshine had done nothing more than discuss the possibility of a loan with a friend at the bank.* During that precertification conversation, Sunshine's Donald Quartel estimated that Sunshine would need to borrow between $1.5 million and $3 million, *but he did not even know who would be involved in the final application.* Initial Decision, 3 FCC Rcd at 4701 25. At no time during that phone conversation did Sun Bank employee McCall make any commitment on behalf of Sun Bank as to its willingness to finance Sunshine's application. *Id. Indeed, she did not even request, and Quartel did not furnish, financial statements or other documentation routinely required from the loan applicants. Nor did she take other steps indicating that Sunshine's loan request was under serious consideration by the bank, that Sunshine had passed initial muster for obtaining a loan, or that the loan would be forthcoming unless circumstances changed.*

5 FCC Rcd at 5751 (emphasis added). On this record, many of the same circumstances appear to obtain.

13. We, therefore, remand this proceeding to the ALJ for the adduction of supplemental evidence to determine (1) what written financial information was before Bank One when it issued its April 1987 letter, both with respect to Skywave's "presumed" principals and with respect to the proposed broadcast venture;[8] (2) whether Sondra Matthews did, in fact, supply Bank One with any relevant financial data prior to the issuance of that original 1987 letter.[9]

14. *Misrepresentation/Lack of Candor.* While the *I.D.* makes adverse conclusions based on a number of perceived discrepancies between the testimony of Lee Perkinson and Sondra Matthews, the Board itself focused on only three that seemed most significant in resolving the exceptions to Issue 1. *See Decision*, 6 FCC Rcdat 5376 nn. 3, 4 and 6. However, it seems rather evident from the Commission's *Memorandum Opinion and Order* that, although it agreed that Matthews had "exaggerated" her role *vis a vis* Perkinson in several respects so as to inflate her claim of sole "control" over Skywave, it did not regard the discrepancies over matters it considered "largely ministerial" to divulge an attempt to deceive the Commission. *See* 7 FCC Rcd at 1701. Thus, these "ministerial" matters need not be reopened or rehashed upon this remand.

15. However, quite germane to the Commission's remand for any necessary supplementation on the financial issue is the apparent conflict between Matthews' hearing testimony and a later-filed exhibit on the question of whether Skywave had provided any written financial data to Bank One prior to its April 1987 letter, or whether such data was not provided until March 1990 in response to a need to increase the loan to $450,000 to cover settlement expenses with a (former) competing applicant. *See I.D.*, paras. 16-18.[10] Thus, our *Decision* noted that:

> though Matthews contended at hearing that she supplied Bank One with financial information (including personal financial data) in 1987, before receiving

> the original loan commitment, she had earlier declared that she had supplied the bank with only a "simple [loan] letter"; but, after a financial issued had been designated against Skywave, Matthews "sent him my own financial statement" and "arrange[d] for the Skywave investors to send the bank their statements." Skywave Exh. 2 at 23. We know not which of Matthews' versions is accurate at this point.

6 FCC Rcd at 5376 n.6 (original emphasis). Although we have reviewed again the pertinent portion of the record, this significant and material discrepancy remains unresolved.[11]

16. Therefore, both on its own terms as a matter of basic truthfulness and in conjunction with the questions relating to the essential validity of Skywave's initial financial certification, we shall ask the ALJ to supplement the record on this key discrepancy, to make very specific findings of fact ont his discrepancy, demeanor findings, and, of course, to report his conclusions of law.

17. ACCORDINGLY, IT IS ORDERED that this proceeding IS REMANDED to the ALJ for further limited hearing in accordance with this opinion and for the preparation of a Supplemental Initial Decision on the matters discussed herein relating to Issues 2-4, *supra* para. 2.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] "An agency, like a court, need not decide issues which are not relevant to its decision." *Colonial Communications, Inc.*, 6 FCC Rcd 2296 (1991) (internal citation omitted).

[2] In essence, both the ALJ and the Board found the applicant to be simply another blatant sham, and thus unworthy of licenseeship. In its *Memorandum Opinion and Order* remanding this case, though, the Commission observed that the term "sham," used customarily by the agency over many years to describe bogus applicants, "appears to have caused some confusion," and it instructed that the term "sham" (as used, *e.g.*, in *Bechtel v. FCC*, No. 91-1112, slip op. at 13 (D.C. Cir. Jan. 31, 1992)) should henceforth "be avoided." 7 FCC Rcd at 1700. Rather, it declared that:

> in similar cases, it would be desirable for ALJs also to frame the [contrived ownership] issue in terms of misrepresentation or lack of candor.

Id., at 1702 n.7. (With sincere respect, however, the Board must candidly confess a degree of uncertainty, since the ownership structure issue tried by the ALJ and reviewed by the Board seems to have been framed and analyzed in the manner suggested in the above quoted footnote. *See I.D.*, 6 FCC Rcd at 1356 (Issue 1); *Decision*, 6 FCC Rcd at 5375 ("Skywave has misrepresented that Sondra Matthews was, is, and/or would have been its sole controlling principal.") We are quite confident, however, that further clarification of the Commission's precise intent in this regard will evolve out of future adjudications, so that its ALJs may properly frame the appropriate issue.)

[3] Although the Commission's *Memorandum Opinion and Order* refers, *passim*, to the "Board's . . . adverse findings . . . and conclusions" under Issue 1, *see e.g.*, paras. 5, 6, 17, 18, 22 and nn. 2, 3, 4, 9, its opinion should not be read mistakenly to suggest that the "findings and conclusions" reviewed by the Commission were not actually those of the ALJ's Initial Decision, *see* 47 CFR 1.267(b), nor that the Commission did not very carefully weigh the ALJ's determinations with the usual deference accorded to the presiding officer; it simply means, we are certain, that the Commission disagreed with the Board that the ALJ's "findings and conclusions" were supported by a "preponderance of the evidence," the review standard routinely used by the Board itself in the performance of its delegated duties.

[4] The ALJ concluded that Perkinson was not merely a "passive investor" in Skywave, but the driving force who had recruited Matthews and used her solely as a local "front." *See I.D.*, paras. 23-32. The Board affirmed this conclusion, *see Decision*, 6 FCC Rcd at 5375, but the Commission's opinion purposely did not reach the question of whether Perkinson was or is truly only a "passive investor." *See* 7 FCC Rcd at 1701.

[5] *Review denied*, 6 FCC Rcd 1893 (1991), *recon. dismissed*, 6 FCC Rcd 4626 (1991).

[6] Skywave Exceptions at 1920.

[7] *Id.*, at 20-21.

[8] All such material, including any financial statements, business plan, cost projections, and bank analyses should be placed upon the record so as to avert ambiguities.

[9] Based upon very similar circumstances, the Board granted exceptions to add a financial issue in *Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6321-22 (Rev. Bd. 1990) (general partner appears to have certified finances on little more than a phone call to Schlichte; as here, Perkinson was alleged "passive investor").

[10] Thus, it seems clear from Matthews' hearing testimony that she claimed to have provided Bank One with financial information, including a budget estimate, in writing prior to its April 1987 letter. Tr. 216-217. *See also* Deposition of Sondra Matthews, filed March 23, 1989, at 109. However, in the hearing exhibits submitted by Skywave and presented on August 13, 1990, Matthews' testimony states:

> Recently, as the prospect of the hearing on the financial issue designated with respect to Evansville Skywave, Inc. approached, I called Mr. Schlichte to ask if he would reconfirm the bank's willingness to lend us the required funds. He indicated that he would have to review more current financial statements from my investors, but that he did not anticipate a problem. I sent him my own financial statement, and asked Mr. Perkinson to arrange for the Skywave investors tosend the bank their statements. Bank One has now reissued a new financing letter to ESI.

Skywave Exh. 2 at 3. However, Perkinson could not recall having submitted written financial data on Skywave (or its principals) to Bank One prior to certification, *see* Tr. 261, nor could Schlichte recall receiving anything other than "verbal contact" prior to the original letter's issuance in April 1987. Tr. 288- 289.

[11] The *I.D.* (at para. 16; emphasis added) reported:

> The first letter was written on April 27, 1987 and the second on March 30, 1990. The 1990 letter noted that the Bank had received personal financial information from Ms. Matthews and updated financial information about major shareholders in SCC.

The original letter contained no such assertion.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Bell Atlantic Telephone Companies — Transmittal No. 509

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: June 18, 1992; Released: June 19, 1992

By the Chief, Tariff Division:

1. On May 8, 1992, the Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 509 to introduce Alternate Serving Wire Center Service as an option for its High Capacity Service. Customers ordering this option will receive a second transmission path to a second serving wire center. The Alternate Serving Wire Center option is available where contiguous wire centers with adjacent fiber feeder routes exist. If the fiber facilities are not available, special construction tariff provisions would apply. Transmittal 509 is scheduled to become effective on June 22, 1992.

2. Metropolitan Fiber Systems, Inc. (MFS) filed a petition on May 26, 1992, to suspend and investigate Transmittal 509. MFS argues that the rates proposed by Bell Atlantic for its Alternate Serving Wire Center Service are unreasonable, and that the cost materials provided fail to meet the standards established by the Commission's price cap rules. MFS Petition at 2-6. The Association for Local Telecommunications Services (ALTS) filed a petition to reject, or alternatively, to suspend and investigate Transmittal 509. ALTS contends that the cost data and net revenue showing provided by Bell Atlantic are inadequate. ALTS Petition at 3-7. ALTS further asserts that the Bell Atlantic filing is unlawfully vague, unreasonably discriminatory, and anticompetitive. *Id.* at 7-12.

3. Bell Atlantic filed its reply to the MFS and the ALTS petitions on June 5, 1992. Bell Atlantic responds that its transmittal demonstrates full compliance with the Commission's cost justification requirements for new services and that it matched the level of detail necessary for Open Network Architecture Tariffs. Bell Atlantic Reply at 2. Bell Atlantic asserts that aspects which ALTS alleges to be vague are fully addressed in other parts of the tariff not affected by this transmittal. *Id.* at 5. Concerning allegations of that the transmittal is discriminatory and anticompetive, Bell Atlantic argues that it should not be required to construct facilities in the absence of sufficient demand. *Id.* at 6. Accordingly, Bell Atlantic urges denial of the MFS and the ALTS petitions. *Id.* at 7.

4. The Tariff Division has reviewed the Bell Atlantic Telephone Companies' Transmittal No. 509 and the appropriate pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, or that an investigation is warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 509 filed by Metropolitan Fiber Systems, Inc., IS DENIED.

6. IT IS FURTHER ORDERED that the petition to reject, or to suspend and investigate, Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 509 filed by the Association for Local Telecommunications Services, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies Notice and Petition for Removal of the Structural Separation Requirement	**CC Docket No. 90-623** **CC Docket No. 88-2, Phase I**

MEMORANDUM OPINION AND ORDER

Adopted: June 11, 1992; Released: June 15, 1992

By the Chief, Common Carrier Bureau:

1. On March 24, 1992, the Ameritech Operating Companies (Ameritech) filed with the Commission a petition for structural relief, pursuant to the *BOC Safeguards Order*[1] We find that Ameritech has made the requisite showing for a grant of its petition for structural relief. Accordingly, we grant Ameritech's petition.

2. In the *BOC Safeguards Order,* the Commission concluded that Bell Operating Company (BOC) provision of enhanced services pursuant to nonstructural safeguards would serve the public interest, and established conditions for the removal of the structural separation requirement for BOC provision of enhanced services. Each BOC must, as detailed in the *BOC Safeguards Order,* demonstrate that it: 1) has federal tariffs in effect for each of its initial interstate ONA services; 2) is technically prepared to offer each of its initial ONA services; and 3) has filed state tariffs for each of its initial ONA intrastate services.[2] In its petition, Ameritech certifies that it has taken all of the steps specified for initial ONA implementation.[3]

3. MCI opposes Ameritech's petition and argues that it would be arbitrary and capricious for the Commission to grant structural relief while relying partly on the federal tariffs Ameritech filed for initial ONA services, because the federal tariffs do not properly implement ONA goals.[4] MCI argues that Ameritech's state tariffs do not necessarily provide a meaningful predicate for structural relief because Indiana Bell's ONA tariff has not been approved.[5]

4. The American Newspaper Publishers Association (ANPA) also opposes Ameritech's petition. ANPA argues that the three prerequisites to a grant of structural relief ignore the likely competitive harm from entry by the BOCs into the enhanced services marketplace on an integrated basis.[6] Therefore, ANPA argues, the Commission should not grant structural relief until the BOCs are prevented from exploiting their local exchange monopoly in the enhanced services marketplace. ANPA further argues that the Commission should refrain from granting the petition until the *BOC Safeguards Order* is reviewed by the courts.[7]

5. The Information Technology Association of America (ITAA) filed comments in support of MCI's comments.[8] ITAA argues that the Commission should retain structural separation to ensure that ratepayers are protected and the enhanced services marketplace remains competitive.[9]

6. None of the commenters in this proceeding has set forth any new substantive reasons why Ameritech's petition should not be granted. Instead, the three commenters disagree with Commission policy on nonstructural safeguards and the implementation of ONA. In the *BOC Safeguards Order,* the *BOC ONA* proceeding, and the *Part 69/ONA Order,* the Commission addressed arguments about the appropriateness of lifting the structural separation requirement, the role of state tariffs in the ONA "process, and the pricing of interstate ONA services.[10] This order merely implements the Commission's decision to substitute nonstructural safeguards for structural separation; it is not the proper forum for parties to reargue the merits of previous Commission decisions.

7. We therefore consider whether Ameritech has made the requisite showing for structural relief. We conclude that it has. First, Ameritech certifies that it is technically prepared to offer each of its initial ONA services consistent with its ONA plan. Second, Ameritech certifies that it has effective federal tariffs for these services. Finally, Ameritech has satisfied the requirement that it file state tariffs for its initial ONA services. In addition, we see no reason to take the unusual step of delaying our grant of Ameritech's petition, as suggested by ANPA, until the courts have reviewed the *BOC Safeguards Order.* Accordingly, we grant Ameritech's petition.

8. Ameritech must continue to comply with the BOC ONA plan and reporting requirements established in the

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[1] *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards,* CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order).*

[2] *BOC Safeguards Order,* 6 FCC Rcd at 7624-7625 n. 212.

[3] Ameritech Petition at 1.

[4] MCI Comments at 2-4. MCI argues that Ameritech charges excessive rates for Automatic Number Identification, Multiline Hunt Group, and other ONA services. *Id.* at 4.

[5] MCI Comments at 4, n. 11.

[6] ANPA Comments at 1-2.

[7] *Id.* at 3-4.

[8] ITAA Comments at 1.

[9] *Id.* at 2-3.

[10] *BOC Safeguards Order* 6 FCC Rcd at 29-30, 44-55; Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, 4 FCC Rcd 1, 162-171 (1988) (*BOC ONA Order); modified on reconsideration,* 5 FCC Rcd 3084 (1990) (*ONA Reconsideration Order);* 5 FCC Rcd 3103, 3112-3113 (1990) (*BOC ONA Amendment Order), Erratum,* 5 FCC Rcd at 4045, *pets. for recon. pending, pets. for rev. pending, California v. FCC* (9th Cir. No. 90-70336, filed July 5, 19900; 6 FCC Rcd 7646, 7663-7664 (1991) (*BOC ONA Further Amendment Order), pet. for rev. pending, MCI Telecommunications Corp. v. FCC and USA* (DC Cir. No. 92-1074, filed Feb. 19, 1992); *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers,* Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, 6 FCC Rcd 4524 (1991) (*Part 69/ONA Order), pets. for recon. pending.*

BOC Safeguards and *ONA* proceedings.[11] In the *BOC ONA Further Amendment Order* the Commission required that the BOCs file further amendments and annual reports on their progress in implementing ONA.[12] In addition, in the *BOC Safeguards Order*, the Commission stated that it would review nonstructural safeguards after all the BOCs have operated under a full ONA environment for three years.[13] We grant Ameritech's petition subject to these ongoing ONA requirements.

9. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. Sections 0.91 and 0.291, Ameritech's Petition for Removal of the Structural Separation Requirement IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[11] In the *BOC ONA Amendment Order*, the Commission required that BOC enhanced services operations must take the same access to certain BOC operations support systems (OSS) that BOCs provide to independent enhanced services providers once structural separation requirements are lifted. 5 FCC Rcd at 3108. Several BOCs have filed petitions for reconsideration and clarification of this requirement. We waive the same access to OSS requirement for Ameritech pending a Commission decision on these petitions.

[12] *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7649-7650, Appendix B.

[13] *BOC Safeguards Order*, 6 FCC Rcd at 7625.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-314

In re

Amendment of Part 73
Regarding Broadcast Hoaxes

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 14, 1992; Released: June 12, 1992

By the Commission:

INTRODUCTION

1. This *Report and Order* amends the Commission's Rules to expressly prohibit the broadcast of hoaxes that are harmful to the public. Specifically, we adopt a rule that will prohibit a broadcast licensee or permittee from knowingly broadcasting false information concerning a crime or catastrophe if it is foreseeable that broadcast of the information will cause substantial public harm, and broadcast of the information does in fact directly cause substantial public harm. This rule will provide the Commission with greater enforcement flexibility by subjecting licensees that perpetrate harmful hoaxes to possible forfeitures, in addition to other applicable penalties. In deference to First Amendment concerns, we have crafted the rule narrowly, restricting only those hoaxes most likely to result in substantial public harm.

2. *Background.* Recently, serious broadcast hoaxes have occurred where the stations involved fabricated stories concerning a crime or catastrophe that alarmed the public and resulted in the needless diversion of public safety or law enforcement resources.[1] Because hoaxes of this nature are inconsistent with the public interest, we initiated a *Notice of Proposed Rule Making* ("*Notice*") to determine whether the Commission should adopt a rule specifically prohibiting such conduct.[2] Under existing policies, the Commission has limited recourse against a licensee that perpetrates hoaxes.[3] In most cases, the Commission can either issue a letter of admonition, which may be considered on renewal or sale of the station or, in extreme cases, it can revoke a station's license.[4] A rule, by contrast, offers greater enforcement flexibility by permitting the Commission to levy fines against the violators. We therefore sought comment on how a hoax rule might be crafted without causing an undue chilling effect on broadcast speech.

Issue Analysis

3. *Proposal.* Our *Notice* suggested a narrowly crafted rule that would result in licensee liability only if three elements were present. First, we proposed that the licensee must know that the material broadcast is false. Because this element would normally implicate dramatizations, which are by nature fictitious, we sought comment on whether other aspects of the rule would sufficiently protect such programming from undue scrutiny. We also suggested limiting the rule to false reports of crimes and catastrophes.

4. Second, we proposed that the hoax must directly cause immediate, substantial and actual public harm. The *Notice* sought comment on what should constitute "public harm," as well as possible definitions for the terms "immediate," "substantial" and "actual." For example, we suggested that the "substantiality" of the harm might be measured in terms of how "widespread" the harm is (*e.g.*, whether there was widespread diversion of law enforcement and public safety authorities from their duties), or it might be measured in terms of the severity of the damage resulting from the harm.

5. Third, we proposed that the public harm flowing from the hoax be foreseeable. Our *Notice* indicated that to avoid unreasonable chilling effects on broadcasters, we could consider public harm foreseeable only if the licensee could expect, with a "significant degree of certainty," that such harm would occur as a result of the hoax. We sought comment on factors determinative of foreseeability, such as the timing and content of the broadcast, as well as the number of public complaints received concerning the broadcast. We also invited comment on whether broadcasters should have the right to presume that the public will behave in a rational manner.

6. *Comments.* Comments were filed by CBS, Inc. ("CBS"), Haley, Bader & Potts ("Haley"), National Association of Broadcasters ("NAB"), National Public Radio ("NPR"), and reply comments were filed by NBC, Inc. ("NBC").[5] All five parties oppose instituting an anti-hoax rule. The commenters argue that adoption of such a rule

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[1] *See Letter to KSLX-FM,* (MMB, dated October 2, 1989) (station admonished for false report that station had been taken hostage); *Letter to WCCC-AM/FM,* (MMB, dated July 26, 1990) (station admonished for false report of nearby volcanic eruption); *Letter to KROQ-FM,* 6 FCC Rcd 7262 (1991) (station admonished for murder confession hoax); *Letter to WALE-AM,* 7 FCC Rcd 2345 (MMB 1992) (station admonished for false report that station employee had been shot).

[2] *Notice of Proposed Rule Making* in MM Docket No. 91-314, 6 FCC Rcd 6935 (1991).

[3] The Commission eliminated a policy against "scare announcements" in 1985. *See Fourth Order Eliminating Unnecessary Broadcast Regulations,* 57 RR 2d 939 (1985). The Commission retained, however, other continuing policies intended to ensure that each licensee complies with its basic obligation to broadcast in the public interest, such as the policy against news staging. These policies may be invoked to sanction (although not fine) licensees that perpetrate hoaxes. *See, e.g., Letter to KROQ-FM,* 6 FCC Rcd 7262 (1991) (public interest obligation); *WMJX Inc.,* 85 FCC 2d 251 (1981) (news staging policy). Our decision here leaves intact all existing policies. *See infra* note 17.

[4] In one recent hoax, the Commission assessed a $25,000 forfeiture against a licensee for violation of the Communication Act's prohibition on the transmission of false distress communications. In that case, the licensee reported a mock nuclear attack on the United States and aired a siren similar to the Emergency Broadcast System signal. *See Letter to KSHE-FM,* 6 FCC 2d 2289 (1991).

[5] An additional informal comment was filed by David H. Atkins, who simply expressed support for imposing fines on stations that engage in hoaxes.

is unnecessary because harmful hoax incidents are rare and there are already adequate deterrents to such conduct. In particular, they contend that existing Commission policies adequately discourage responsible broadcasters from engaging in harmful hoaxes. CBS, for example, believes the Commission should not underestimate the effect of a letter of admonition, which may adversely affect a licensee's chances for renewal.[6] In addition, Haley, NAB and NBC point out that hoax perpetrators may be subject to criminal and civil penalties, which effectively discourage and punish irresponsible broadcast pranks.[7] Audience reaction to such pranks is yet another deterrent.[8] According to NBC, a broadcast station's credibility with the public is certain to be hurt by such conduct, which could translate into the licensee losing significant audience share.[9]

7. The commenters also question whether such a rule can be crafted to avoid First Amendment infirmities. For example, these commenters are concerned that vague and overbroad definitions of "falsity," "public harm" and "foreseeability" could inhibit broadcasters' programming decisions. In this regard, CBS, NPR, and NBC are especially concerned that the rule might implicate legitimate fictional program material, and they therefore request that we exempt dramatizations from any final rule.[10] CBS and NPR are more amenable to a narrower rule prohibiting only broadcast hoaxes involving false reports of crimes or catastrophes.[11] Haley believes a hoax rule based on the tort principles of harm and foreseeability is overly intrusive because it forces broadcasters to perform complex content evaluation before airing programming.[12] To avoid this problem, Haley suggests that the Commission adopt a specific policy against hoaxes, rather than a rule.[13]

DECISION

8. We will adopt a rule against hoaxes, but restrict that rule to incidents involving the false report of a crime or catastrophe.[14] Accordingly, we are amending Part 73 of our Rules as set forth in Appendix A. Contrary to commenters' assertions that a rule is unnecessary because harmful hoaxes occur infrequently, we believe that this regulation is needed to contend with and deter serious hoaxes that pose a substantial threat to the public safety and welfare. A rule will give us greater enforcement flexibility to deal with harmful hoaxes by allowing us to subject licensees perpetrating these hoaxes to a range of monetary fines.[15] In recent cases, we have been limited to only two types of penalties -- admonition and license revocation or non-renewal.[16] This rule will provide us with the option of imposing an intermediate sanction, one which has more deterrence value than admonition but which is less drastic than license revocation or non-renewal.[17]

9. In addition, we believe that the rule is sufficiently narrow to avoid any adverse impact on broadcast speech. In this regard, it is not our intent to restrict harmless pranks, or to deter broadcasts that might upset some listeners but do not pose a substantial threat to public health or safety. We instead focus on a narrow category of cases -- those involving the false report of a crime or catastrophe -- which present the greatest potential for substantial public harm. Moreover, within this narrow category of cases, we restrict the reach of the rule even further by holding licensees liable only when they know the report to be false and can foresee that the report will, and does in fact, result in substantial public harm.[18] We believe that these careful restraints should sufficiently address our concerns without causing an undue chilling effect on broadcast speech. We also believe that the rule, as drawn, is fully consistent with First Amendment principles.

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[6] CBS Comments at 3-4.

[7] Haley Comments at 2; NAB Comments at 1-2; NBC Reply Comments at 4.

[8] NBC Reply Comments at 3-4.

[9] CBS noted that the licensee had no direct knowledge of the hoax in at least two of the recent cases. According to CBS, in both cases the licensees, upon learning of the hoaxes, promptly took appropriate disciplinary measures and made on-air apologies for the incidents. CBS Comments at 2. *See Letter to KROQ-FM*, 6 FCC Rcd 7262 (1991); *Letter to KSHE-FM*, 6 FCC Rcd 2289 (1991).

[10] CBS Comments at 5; NPR Comments at 4; NBC Reply Comments at 6.

[11] CBS Comments at 5; NPR Comments at 4.

[12] Haley Comments at 7.

[13] Haley Comments at 11.

[14] A "crimes and catastrophes" standard encompasses the kinds of harmful hoaxes that have raised the most public concern to date. For purposes of our rule, a "crime" is defined as any act or omission that makes the offender subject to criminal punishment by law. A "catastrophe" is defined as a disaster or imminent disaster involving a violent or sudden event affecting the public.

[15] Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*, gives the Commission authority to fine any broadcaster who willfully or repeatedly violates any rule, regulation or order. *See* 47 U.S.C. § 503(b). Congress recently increased the amount of these forfeiture fines. Accordingly, a broadcaster can be fined up to $25,000 for each violation, or each day of a continuing violation, except that the amount for a continuing violation cannot exceed $250,000. *See* Omnibus Reconciliation Act of 1989, Pub. L. No. 101-239,103 Stat. 2131 (effective Dec. 19, 1989).

[16] We decline to follow Haley's approach and adopt a policy rather than a rule. A policy statement would not augment our enforcement powers in this area. We would still be limited to the penalties of admonition and license revocation or non-renewal, with no ability to assess forfeitures where appropriate.

[17] We do not intend by our adoption of a specific rule addressing harmful hoaxes to displace our existing range of remedies for false programming that is not covered by this rule. We will continue to enforce other appropriate policies against licensees perpetrating harmful hoaxes (*e.g.*, news staging policy). In this regard, we note that false programming may be actionable as a violation of a licensee's public interest obligations, even if it falls outside of the strict requirements of the new rule.

[18] We do not believe that a hoax rule based on tort principles is overly intrusive, as Haley suggested. Indeed, tort concepts such as knowledge, foreseeability and harm are employed to ensure that the rule is fair, balanced and not overly restrictive of speech. In practice, we do not think that broadcasters will find application of these principles to be burdensome. *See infra*, para. 11.

10. In this latter regard, the Supreme Court has recognized that speech may be subject to government regulation if the regulation is narrowly tailored to further a compelling government interest and is the least restrictive means of furthering that interest. *Sable Communications of California, Inc. v. FCC,* 492 U.S. 115 (1989). We believe that our rule would meet this exacting test. First, the rule is narrowly tailored to curtail only hoaxes involving the false report of a crime or catastrophe when the licensee knows the report is false and can foresee that the report will, and it does in fact, result in substantial public harm. Thus, the rule cannot be considered to be overly broad.[19] Second, the government has a compelling interest in preventing substantial public harm, such as the substantial diversion of police and emergency resources from their duties. Finally, the Commission has chosen the least restrictive means by which it may effectively and precisely further its interest of preventing substantial public harm.

11. Moreover, contrary to the concerns expressed by the commenters, a bedrock principle of First Amendment doctrine holds that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[20] Thus, for example, the Supreme Court has never imposed a constitutional bar to regulating speech that threatens to cause imminent lawless action.[21] Similarly, the First Amendment does not preclude civil liability for broadcasts that create a foreseeable risk of personal injury. *See Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 123 Cal. Rptr. 468 (1975).[22] The broadcast speech in these cases is closely analogous to the hoax programming which we seek to preclude and the courts have not found a First Amendment bar to imposing liability in such cases. In each instance, the speech at issue must create a foreseeable risk of substantial harm and such harm must, in fact, result. We now examine each element of the rule in greater detail.

12. *Licensee Knowledge of Falsity of Crime or Catastrophe.* In order to incur liability, a licensee must have known that the broadcast concerning a crime or catastrophe was false. To this end, a licensee will be held accountable for the actions of its employees. Such accountability is a well established Commission principle.[23] Moreover, accountability encourages licensees to make employees aware of the hoax proscription and to police their actions. Some commenters argue that prompt and appropriate corrective action on the part of the licensee should be a factor in assessing liability. Although our general policy is not to consider such remedial actions in determining whether a rule violation has in fact occurred,[24] we do note that a licensee's overall conduct in connection with such a violation is always assessed in determining the appropriate sanction and could, in certain circumstances, result in a decision that no sanction is warranted.[25] Finally, we have taken steps to ensure that this element of our rule does not implicate legitimate dramatic or other fictional programming. Thus, as explained below in our discussion on foreseeability, we are instituting a presumption that will effectively remove fictional material accompanied by disclaimer from liability.

13. *Foreseeability of the Substantial Public Harm.* For a hoax to be actionable, the substantial public harm that results from the broadcast must be foreseeable. We believe that a foreseeability test is needed to avoid imposing unreasonable or chilling constraints on broadcast speech. For purposes of this rule, the public harm will be deemed foreseeable if the licensee could expect with a significant degree of certainty that substantial harm would occur. We will presume, and will accord broadcasters the right to presume, that the public will behave in a rational manner. We will not hold broadcasters accountable for unreasonable or unpredictable public conduct.

14. Also, we believe that the nature of the broadcast will be the single greatest determinant of foreseeability. Thus, the more inherently unbelievable the broadcast, the more certain broadcasters can be that substantial public harm is unforeseeable. By contrast, the timing of the broadcast will not necessarily determine foreseeability, although it may be one factor that is considered. Thus, for example, if substantial harm results from a very realistic broadcast hoax, we will not conclude that the harm was unforeseeable simply because the program aired on April Fool's Day. Other factors, such as the number of public

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[19] To buttress the specific scope of the rule, we presume that legitimate fictitious or dramatic programming, when accompanied by an appropriate disclaimer, does not create a risk of foreseeable harm. *See infra* para. 15. This tailoring of the rule is consistent with cases that have examined First Amendment implications of imposing civil liability on dramatic programming. *Cf. Zamora v. CBS,* 480 F. Supp. 199, 206 (S. D. Fla. 1979); *Olivia N. v. NBC,* 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981).

[20] *Schenck v. United States*, 249 U.S. 48, 57 (1919).

[21] *Brandenburg v. Ohio,* 395 U.S. 444 (1969). *See also United States v. Kelner,* 534 F.2d 1020 (2d Cir. 1976) (televised threats of political assassination punishable without violating First Amendment); *United States v. Irving,* 509 F.2d 1325 (5th Cir. 1975) (false threat of hijacking punishable without violating First Amendment).*Cf. Miller v. California,* 413 U.S. 15 (1973) (obscene materials); *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942) (fighting words); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation); *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985) (false or deceptive advertising).

[22] In *Weirum,* the California Supreme Court upheld a jury verdict against a radio station, finding that a radio contest negligently caused listeners to drive recklessly, resulting in a motorist's death. The broadcasts actively and repeatedly encouraged listeners to speed to announced locations. Liability was imposed on the broadcaster for urging listeners to act in an inherently dangerous manner. *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40,123 Cal. Rptr. 468 (1975). *See also Olivia N. v. NBC,* 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981) (distinguishing *Weirum* as involving a broadcast that urged listeners to act in an inherently dangerous manner).

[23] *See, e.g., Empire Broadcasting Corp.*, 25 FCC 2d 68 (1970) (holding licensee accountable for actions of employees who violated technical and program log requirements).

[24] *See, e.g., Letter to WALE-AM,* 7 FCC Rcd 2345 (MMB 1992) (admonishing licensee for hoax despite prompt disciplinary and remedial action).

[25] The Commission recently set standards for assessing forfeitures and indicated that certain criteria (*e.g.*, good faith or voluntary disclosure, history of overall compliance) may be taken into consideration and could result in a reduction in the amount of the fine imposed. *See Policy Statement on Standards for Assessing Forfeitures,* 6 FCC Rcd 4695, 4700 (1991), *recon. denied, Memorandum Opinion and Order* in Standards for Assessing Forfeitures, released June 4, 1992, FCC 92-212.

complaints received about the broadcast, may also be relevant to determine whether the station's action should have been foreseeable.

15. We are also mindful of commenters' concern that legitimate fictitious programming might be implicated by our rule, since all fiction is, by definition, "false" programming. Therefore, one situation in which we will presume that programming otherwise subject to this rule will pose no foreseeable harm is if the programming is accompanied by a disclaimer. To qualify for this presumption, disclaimers must clearly label the broadcast as a fiction and be presented in a way that is reasonable under the circumstances.[26]

16. *Direct Causation of Substantial Public Harm.* Finally, the hoax must in fact directly cause substantial public harm. "Public harm" will include damage to the health or safety of the general public, diversion of law enforcement or other public health or safety authorities from their duties and damage to property. In all cases, the public harm must be substantial. The public harm must also begin immediately after the broadcast and result in actual damage.[27]

17. Several commenters asked us to define public harm in more concrete terms. In particular, they were concerned with how we would measure the "substantiality" of the public harm. Rather than adopt a particular benchmark or definition by which we will assess "substantial" public harm, we have decided to leave this determination to the factual context of each case. In general, however, a broadcast concerning an imaginary danger that diverts local police and emergency resources from their duties, causes widespread public disorder or harms the health or safety of the general public, would most likely inflict substantial public harm. By contrast, a broadcast hoax that results in no more than a few questions to the police or complaints to the station would probably not impose substantial public harm. Clearly, we are concerned with public harm that is more than nominal in nature.

CONCLUSION

18. By this *Report and Order*, we adopt a rule specifically prohibiting licensees from knowingly engaging in hoaxes involving a false report of a crime or catastrophe when it is foreseeable that the report will, and does in fact, result in substantial public harm. These hoaxes endanger the public health, safety and welfare and are inconsistent with licensee public interest obligations. This hoax rule will give us greater regulatory flexibility by providing us with the sanction of forfeitures, which is less drastic than license revocation or non-renewal, but which has more deterrence value than admonition. The rule is also narrowly tailored so that it will not unduly inhibit broadcast speech.

ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 4 and 303 of the Communications Act of 1934, 47 U.S.C. Section 154 and 303, as amended, Part 73 of the Commissions Rules IS AMENDED as set forth below in Appendix A.

20. IT IS FURTHER ORDERED that the amendments to 47 C.F.R. Part 73 adopted in this *Report and Order* will be effective 30 days after publication in the Federal Register.

21. IT IS FURTHER ORDERED that this proceeding is terminated.

22. Further information on this proceeding may be obtained by contacting Kathleen O'Brien Ham, Mass Media Bureau at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Appendix A

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

2. Section 73.1217, Broadcast hoaxes, is added to Part 73 to read as follows:

§ 73.1217 Broadcast hoaxes.

No licensee or permittee of any broadcast station shall broadcast false information concerning a crime or a catastrophe if (a) the licensee knows this information is false, (b) it is foreseeable that broadcast of the information will cause substantial public harm, and (c) broadcast of the information does in fact directly cause substantial public harm. Any programming accompanied by a disclaimer will be presumed not to pose foreseeable harm if the disclaimer clearly characterizes the program as a fiction and is presented in a way that is reasonable under the circumstances.

NOTE 1:

For purposes of this rule, "public harm" must begin immediately, and cause direct and actual damage to property or to the health or safety of the general public, or diversion of law enforcement or other public health and safety authorities from their duties. The public harm will

[26] For example, indicia of reasonableness would include airing disclaimers at the beginning and end of a program and ensuring that no more than 15 minutes elapses between disclaimers during a program. We do not, of course, intend to impose a requirement that *all* fictional works must now include disclaimers. Rather, disclaimers would be necessary only in those programs that would otherwise meet all elements of the rule. For example, a fictional work that is not reasonably susceptible to being understood as a report of a crime or catastrophe would not need a disclaimer.

[27] By "immediate," we mean that the harm would have to occur contemporaneously or shortly after the broadcast. By "actual" damage, we mean that there must be injury in fact; the mere threat of harm is not sufficient.

be deemed foreseeable if the licensee could expect with a significant degree of certainty that public harm would occur. A "crime" is any act or omission that makes the offender subject to criminal punishment by law. A "catastrophe" is a disaster or imminent disaster involving violent or sudden event affecting the public.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-221

In the Matter of

Review of the Commission's
Regulations Governing Television
Broadcasting

NOTICE OF PROPOSED RULEMAKING

Adopted: May 14, 1992; Released: June 12, 1992

Comment Date: August 24, 1992
Reply Comment Date: September 23, 1992

By the Commission: Commissioner Duggan issuing a separate statement.

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I. INTRODUCTION

1. This *Notice of Proposed Rulemaking* (*NPRM*) proposes alternative means of lessening the regulatory burden on television broadcasters as they seek to adapt to the multichannel video marketplace. As documented last year in the FCC Office of Plans and Policy's (OPP) wide-ranging report on broadcast television and the rapidly evolving market for video programming,[1] that market has undergone enormous changes over the period between 1975 and 1990. In particular, the report found that the policies of the FCC and the entire federal government (*e.g.*, the 1984 Cable Act) spawned new competition to broadcast services that have resulted in a plethora of new services and choices for video consumers. The report further suggested that these competitive forces were affecting the ability of over-the-air television to contribute to a diverse and competitive video programming marketplace.

2. The OPP report prompted us to release a *Notice of Inquiry* (*NOI*)[2] and to seek comment on whether existing television ownership rules and related policies should be revised in order to allow television licensees greater flexibility to respond to enhanced competition in the distribution of video programming. After reviewing the comments filed in response to the *NOI*,[3] we are opening this proceeding to consider changes to several of the structural rules that have governed the television industry for many years. These include rules that establish national and local limits for the number of television stations in which one entity may hold an attributable interest, as well as certain rules governing the three national networks. We will also reexamine the radio-television crossownership rule, which generally prohibits one entity from owning both a radio and a television station that serve substantially the same area. Through our review of the comments filed in response to the proposals we present in this *NPRM*, we expect to identify specific rule changes designed to assure that Commission policy will facilitate the further development of competition in the video marketplace and the attendant advantages to consumers in increased choice.[4]

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[1] F. Setzer and J. Levy, *Broadcast Television in a Multichannel Marketplace*, FCC Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996 (1991) (*OPP report*).

[2] *Notice of Inquiry* in MM Docket No. 91-221, 6 FCC Rcd 4961 (1991), 56 FR 40847 (August 16, 1991).

[3] Thirty-nine parties filed initial comments, and 19 filed reply comments. A list of commenters is attached as Appendix A.

[4] We focus in this document on a number of structural ownership and network-related rules for which specific changes hold some promise of strengthening the potential of over-the-air television broadcasters to serve the public. Commenters have addressed a variety of other issues, including the network-affiliate rules, cable-broadcast crossownership, cable-network crossownership, retransmission consent/compulsory license, the prime time access rule, and foreign ownership. A number of these matters are already the subject of other proceedings or are sufficiently discrete to warrant separate analysis and are thus not discussed herein. The cable-network crossownership rule, for example, is the subject of our *Second Further Notice of Proposed Rulemaking* in BC Docket 82-434, 7 FCC Rcd 586 (1991). Mandatory cable television carriage of broadcast signals is the subject of our *Second Further Notice of Proposed Rulemaking* in MM Docket 90-4, 6 FCC Rcd 4545 (1991). Specifically exempt from our inquiry are those regulatory provisions and policies relating to VHF noncommercial channel assignments, comparative licensing, minority distress sales and tax certificates, and television station-newspaper crossownership that are covered by statutory appropriations restrictions. *Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies for the Fiscal Year Ending September 31, 1992*, Pub. L. No. 102-140,105 Stat. 797 (1991)

II. >OVERVIEW OF THE INDUSTRY[5]

3. The comments received in response to the *NOI* generally concur that the television industry has undergone significant changes in the past decade and a half, as reflected in the current state of the video programming market. In particular, the industry has experienced an enormous expansion in the number of video outlets available to most viewers and in the alternative sources of video programming. Since 1975 the number of broadcast television stations has increased by 50 percent (from 953 to 1494), with independent television stations accounting for three-quarters of that growth.[6] Today, more than half of all households receive 10 or more over-the-air television signals, while the median household received only six broadcast signals in 1975.[7] At the same time, cable television has grown explosively as a competing force. By 1990, approximately 90 percent of television households were passed by cable; of all television households, approximately 60 percent subscribed to cable.[8] With cable channels included, more than half of all households now receive at least 30 channels. In addition, new program networks have been launched to fill those channels. For example, Fox is emerging as a robust competitor to existing over-the-air networks when not long ago a fourth television broadcast network was unthinkable. In addition, there are over 100 national and regional cable networks.[9] Other multichannel video providers, such as home satellite dish systems and MMDS, as well as home videocassette recorders, also provide alternative sources of video programming. With these new sources of video information and entertainment now available, American households have increased their use of television, watching 7 hours and 2 minutes of programming per day on average in 1990, compared with 6 hours and 44 minutes in 1980.

4. As a greater number and variety of programming choices have emerged, viewers have begun to migrate from traditional broadcast services to other program sources. The percentage of total viewing captured by broadcast television stations fell from 81 percent in the 1984-1985 television season to 70 percent during the 1989-1990 season.[10] This decline in broadcast share results in large part from both increased cable penetration and increased cable viewing in cable households. In addition, the proportion of households owning VCRs, satellite dishes, and MMDS receiving equipment increased dramatically from 1984 to 1991. In short, the sources of video entertainment available to U.S. consumers have greatly proliferated.

5. Declining audience shares have been reflected in declining advertising revenues for broadcast television stations and networks. This is not surprising, since revenues would be expected to decline as competition put downward pressure on advertising rates. The OPP report indicated that network advertising revenues in real (i.e., inflation-adjusted) dollars reached a peak in 1984 and have declined since; station revenues in real terms also declined in 1989 and 1990, and stood at roughly the same level in 1990 as in 1986.[11] Because the number of stations has increased since 1986, however, real advertising revenues per station have fallen by roughly four percent per year from 1987 on.[12] These data are indicative of more competition in video distribution and more options for advertisers.

6. As a result, profits of broadcast television stations also have declined steadily in recent years. Real profits for the average affiliate and average independent station have fallen 21 percent and 68 percent, respectively, since 1984. Although most large-market stations, particularly network affiliates, have continued to earn high, though falling, profits, losses apparently have become the norm in much of the rest of the industry. In 1989, at least 25 percent of stations in the top ten markets experienced losses; aggregate losses occurred in most markets below the top 100; and at least 50 percent of independents in all market classes below the top ten experienced losses.[13]

7. Just as the record reflects a consensus concerning the current state of the market, there appears to be general agreement that the competitive structure of the broadcast television industry has changed for the long term.[14] The comments generally do not disagree that cable viewing now occupies a significant share of the television audience, and that cable's share is likely to increase.[15] The fact that cable's share of advertising revenues is lower than its share of viewers (6 percent of advertising revenues as compared with 22 percent of viewing on channels accepting advertising) suggests that substantial cable advertising growth could occur as advertisers respond to audience shifts and as mechanisms develop for measuring and selling cable audiences more effectively.[16] Accordingly, the comments generally reflect the belief that over-the-air television will face increasing competitive pressure from multichannel media with dual revenue streams.[17] Regulations adopted

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[5] A detailed review of major developments in the television industry prepared by the staff, entitled *Overview of the Television Industry,* has been placed in the record.

[6] *OPP report, supra* note 1, at 4008.

[7] *Id* . at 4013.

[8] *Id* . at 4044.

[9] *Id.* at 4049.

[10] *Id.* at 4017. The recent ratings performance of some of the major broadcast networks has, however, improved. *See, e.g.,* "So Far, No TV Losers in Olympics," *N.Y. Times,* Feb. 17, 1992, at D-4 (quoting ABC Senior Vice President Alan Wurtzel concerning "the beginning of a leveling off for network audiences"). *See also* "Broadcasters Take a Bite Out of Cable in the Ratings," *N.Y. Times,* March 9, 1992, at D-1 (noting that, in the February 1992 ratings period, aggregate network ratings increased to 41.9 from 38.5 the previous year, while aggregate cable ratings dropped to 10.1 from 12). Given the ratings significance of the "sweeps period" and the Winter Olympics, the long-term significance of these improved network viewing patterns is uncertain.

[11] *Id.* at 4075.

[12] *Id.* at 4080.

[13] *Id.* at 4025.

[14] That is not to suggest that there are no disputes as to specific financial and market projections relevant to the future of the broadcast industry, or that those disputes do not warrant careful review. We invite any further comment concerning these issues.

[15] *OPP report, supra* note 1, at 4057-4058. As the OPP report stated, this shift makes cable an increasingly attractive and competitive advertising medium. *Id.*

[16] *Id.* at 4082.

[17] As the OPP report pointed out, new technologies on the horizon should continue to increase competition to broadcasting. Direct broadcast satellites, if successful, will provide additional choices for viewers; digital signal compression apparently

before the advent of such competition may reduce the ability of broadcasters to respond competitively and to continue offering services that advance the public interest. These conclusions lead us to reexamine and to propose revisions to certain of the rules governing the television industry's market structure. This we do in the following sections.

III. THE NATIONAL OWNERSHIP LIMITATIONS

8. *Background.* The Commission's national multiple ownership rule limits the number and audience reach of television stations in which an entity may hold an attributable interest to 12 stations and 25 percent of total television households. The rule allows ownership of interests in up to two additional stations reaching an additional five percent of total television households if those stations are minority controlled.[18]

9. *Comments.* Virtually all commenting broadcasters, broadcast interest groups, and the three national broadcast networks urge the Commission either to modify or eliminate the multiple ownership rule.[19] Broadcasters contend that the economies of scale resulting from increased group ownership would encourage the production of new, diverse, and especially locally-produced programming. They also argue that the proliferation of alternative sources of video programming lessens the possibility of economic concentration and consequent harm to diversity on a national basis. Moreover, broadcasters point out that commonly owned stations also contribute to diversity and that group ownership does not mean that jointly owned stations speak with one voice. Finally, these commenters contend that the key issue is not what considerations will justify changes in the multiple ownership rule, but what factors warrant its retention.

10. Opponents of repeal or relaxation of the national ownership caps, including the Motion Picture Association of America (MPAA), the Office of Communication of the United Church of Christ (OC/UCC), the United States Catholic Conference (USCC), and the Telecommunications Research and Action Center (TRAC), argue that the rule has increased ownership diversity, particularly for minorities, and has not repressed new program sources. Therefore, they contend, any change in the rule would reduce programming diversity and harm the public interest.[20] USCC asserts that the public interest requires more, not less, government regulation of broadcasters, many of whom are ignoring their responsibilities to the public interest.[21] USCC contends, for example, that local news operations have been pared or closed down entirely, public interest programming is decreasing, and time brokerage is depriving many viewers of local programming. Finally, they assert that the national ownership rule is not harming networks or broadcasters. These commenters argue that the increase in the station limit from seven to twelve did not help broadcasters because their problems are the result of mismanagement, short-term dislocations, and increased expenses. Therefore, they conclude that an additional increase in the multiple ownership limits would not cure any of broadcasting's ills.

11. *Proposal.* In view of the many changes in the video marketplace detailed above, we seek comment on whether to relax the national ownership rule. We have previously recognized the benefits that may accrue from increased station group ownership, including: efficiencies from combining managerial, technical and other operations; efficiencies from group advertising sales and program purchases; and efficiencies that might flow from the stations forming the nucleus of a new network.[22] We continue to believe that these increased economies of scale could permit the production of new and diverse, including locally produced, programming.[23] Moreover, we believe that the primary concern underlying the national ownership rule--preventing economic concentration and consequent harm to diversity--may have abated with the proliferation of television stations and alternative sources of video programming described in Section II *supra*. As noted above, this increase in the number of sources of video programming available to American consumers has had an adverse impact on the advertising revenues earned by many existing broadcast television stations. We are concerned that we not perpetuate unnecessary regulations that impede the competitive ability of these stations or preclude them from

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will expand the ability of satellite and cable providers to offer more channels on their existing facilities; and advanced television technologies such as HDTV may well be available on other media before being fully deployed over terrestrial broadcast facilities. *Id.* at 4065, 4042-4043; S. Merrill Weiss, "Rolling Out Advanced Television in the United States: A Broadcaster's Perspective," *Broadcast Cable Financial Journal*, March-April 1991, at 28.

[18] 47 C.F.R. § 73.3555(d). The rule, adopted as the Seven Station Rule in 1953, reached its present form in 1985. In its initial order adopting the 12 station rule, the Commission decided to sunset the new national rule entirely in order, among other things, to encourage the emergence of new networks and to foster efficiencies in the operations of stations. *See Report and Order* in Gen. Docket 83-1009, 100 FCC 2d 17 (1984) (*Multiple Ownership Order).* On reconsideration, the Commission reversed its decision to sunset the rule. The Commission also adopted the audience reach limit and the provisions designed to foster minority ownership. *Memorandum Opinion and Order,* 100 FCC 2d 74 (1985).

[19] *See, e.g.,* Associated Broadcasters and Galloway Media Comments at 3; Bonneville International Corporation Comments at 4; Cedar Rapids Television Company *et al* Comments at 8; ABC Comments at 20; CBS Comments at 11; NBC Comments at 56; National Association of Broadcasters (NAB) Comments at 18; Fox Broadcasting Company Comments at 17; Tribune Broadcasting Company Comments at 14.

[20] MPAA Comments at 25; OC/UCC Comments at 2; TRAC Reply Comments at 9; USCC Comments at 2.

[21] USCC Comments at 2.

[22] *See Multiple Ownership Order, supra* note 18, at 27, 44.

[23] OC/UCC presents a study purporting to contradict the proposition that savings from the efficiencies of group ownership are invested in additional local programming. OC/UCC Comments at 12. However, since OC/UCC's study is based on a sample of only 5 of the over 200 television markets, it is not clear that the study is representative of television stations or markets in general. In any event, their results indicate that group-owned stations carry slightly more nationally syndicated programming than do individually owned stations. OC/UCC's data also indicate that group-owned stations surpassed individually owned stations in providing local news as well as national news and public affairs programming in 1984 and 1989, the last year of the study. Therefore, we seek comment regarding OC/UCC's findings, including additional independent studies as well as the experience of specific group owners, and the appropriate import to be ascribed to these data.

taking advantage of certain economic efficiencies. We are sensitive to arguments about the effect of ownership concentration on programming diversity. If, however, by altering the current national ownership restrictions, we could permit broadcast television stations to compete more effectively without permitting undue economic concentration or loss of programming diversity, we believe we should consider such action.

12. With these considerations in mind, we seek comment on which, if any, modification of the national ownership limits would best serve the public "interest. Specifically, we invite comment on amending the national numerical limit to permit common ownership of 20 or perhaps 24 television stations instead of 12 and altering the national reach restriction to permit a group owner to reach 35 percent instead of 25 percent of the national audience. This moderate approach would allow some growth in the size of group owners and provide us an opportunity to assess over time the benefits and any costs of increased station ownership. We also seek comment on whether a smaller increase in the limits, *e.g.*, from 12 to 18 stations and 25 to 30 percent reach, would adequately serve our goals. Finally, we seek comment on whether we should modify only the numerical limit (and retain the 25 percent reach limit) to address the concern that it is the numerical limit that unduly restricts group owners wishing to invest in smaller market stations, because such owners will reach substantially fewer television households when they reach the numerical cap than will group owners investing in larger market stations.[24] We invite comment on the foregoing proposals and on any other proposals commenters believe would be consistent with our stated objectives.[25]

13. As noted above, our current rule allows a single entity to hold interests in up to 14 (rather than 12) television stations reaching 30 (rather than 25) percent of total television households if the additional stations are minority controlled. We seek comment on including a similar minority incentive should we modify the national ownership limitations pursuant to any of the proposals outlined above. In particular, commenters are asked to address how such an incentive should be structured.[26]

IV. THE CONTOUR OVERLAP ("DUOPOLY") RULE

14. *Background.* Section 73.3555(a)(3) of the Commission's Rules prohibits ownership of cognizable interests in television stations with overlapping Grade B contours. This version of the television duopoly rule was adopted in 1964, when the Commission first prohibited station ownership based on fixed contour overlap standards.[27] At the time, the video marketplace consisted solely of 649 television stations and a small number of cable systems whose primary purpose was to retransmit the signals of over-the-air broadcast stations. The Commission adopted the rule, along with fixed contour overlap standards for the AM and FM services, in order to provide some predictability and rationality in what had been, until that time, an *ad hoc* approach to approving common ownership of stations in local markets. The Commission explained its selection of the Grade B contour as the prohibited degree of overlap by noting that "television has a considerably greater impact" than radio, and that there are fewer television than radio channels available. In light of these facts, the Commission concluded that a "more restrictive" overlap rule was necessary for television, and declined to adopt a standard based on Grade A overlap.[28]

15. *Comments.* Most commenting broadcasters, broadcast interest groups, and the national networks generally advocate relaxation of the duopoly rule.[29] They contend that economies of scale are greatest at the local level, and that by using managerial, technical, and on-air talent to which they already have access, group owners can improve local service. They further assert that, given the level of competition in most local markets, the duopoly rule is not needed to ensure diversity, except perhaps in a few small markets. In fact, they claim, to the extent that the rule impedes the competitiveness of broadcasters, it may actually undermine the Commission's diversity goal.

16. Commenters opposed to any relaxation or elimination of the duopoly rules, including MPAA and Fisher Broadcasting, argue that the danger of concentration and resulting harm to diversity are greatest at the local level because the number of frequencies available for licensing is limited.[30] They further assert that the diversity of ideas to which an individual member of the audience is exposed depends on the number of diverse views available in the local market. According to those commenters, there is no

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[24] We note that the OPP report was considerably more pessimistic concerning the future prospects for small market and UHF stations than for large market and VHF stations. *OPP report, supra* note 1, at 4023-4025.

[25] In our outstanding proceeding concerning television satellites, *see Second Further Notice of Proposed Rulemaking* in MM Docket No. 87-8, 6 FCC Rcd 5010 (1991), we asked whether television satellites should be exempted from the multiple ownership rule. In light of the proposals presented herein, commenters who filed in that proceeding are invited to update their comments in this proceeding. Commenters are encouraged to address whether that docket should be incorporated into this proceeding; or whether the issues raised in that docket should be addressed prior to, or concurrently with, the termination of this docket.

[26] The Commission in its recent radio ownership decision declined to retain a minority incentive in the national radio ownership rules. *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755 (1992) (*Revision of Radio Rules and Policies*), paras. 26-28. In light of that decision, we seek comment on the efficacy of the current minority incentive for television ownership in the marketplace.

[27] *Report and Order* in Docket 14711, 45 FCC 1476, 1480 (1964), *on reconsideration*, 3 RR 2d 1554 (1964). An earlier version of the rule prohibited licensing of a station if it was under the same ownership or control as another station broadcasting in "substantially the same service area." *Rules and Regulations Governing Experimental Television Broadcast Stations*, 5 Fed. Reg. 2382, 2384 (1940).

[28] 45 FCC at 1484. The Commission also noted that in many areas of the country, Grade B signals provided the only available service.

[29] *See, e.g.*, Abry Communications Comments at 5; Associated Broadcasters and Galloway Media Comments at 7; Bonneville International Corporation Comments at 5; Cedar Rapids Television Company *et al* Comments at 8; Group One Broadcasting Comments at 6; Tribune Broadcasting Comments at 15; NAB Comments at 32; INTV Comments at 24; CBS Comments at 24; NBC Comments at 61.

[30] MPAA Comments at 23; Fisher Broadcasting Comments at 5.

evidence that eliminating or relaxing the rule will contribute to competition in local markets because cross-subsidies from the stronger to the weaker commonly owned stations disadvantage other competitors (particularly smaller stations) in those markets.

17. *Proposals.* The duopoly rule is the oldest and, as far as diversity is concerned, perhaps the most important of our ownership restrictions. Yet, it is common ownership of precisely those co-located, same-service facilities now governed by the duopoly rule that may hold promise for the greatest economic efficiencies. As we recently stated in our decision to relax the radio ownership rules, allowing ownership of more than one station in a market (or region) would permit beneficial merger of administrative, newsgathering, and production functions.[31] Offering a wider audience to advertisers and sharing joint and common costs, regional groups of stations under common ownership could also compete more effectively. Moreover, relaxing the rule may enable financially troubled stations to remain on the air or improve their service, thus promoting our goals of diversity and localism. Finally, we note that the level of competition in local markets has greatly increased since the duopoly rule was adopted in 1964. More than half of all households (54 percent) now receive at least 10 over-the-air signals, as compared to four percent in 1964. If cable channels are included, more than half of all households receive at least 30 channels. Nonetheless, given the fundamental importance of the contour overlap limitation in protecting our interest in diversity, we believe caution is counseled in amending this rule.

18. Accordingly, we seek comment on whether and how we might modify the contour overlap rule to afford broadcasters greater flexibility, yet avoid undue harm to our underlying competition and diversity concerns. First, we invite comment on whether we should change the signal contour used to determine whether prohibited overlap occurs from the Grade B to the Grade A. This change would narrow the geographic area in which common ownership of television stations would trigger our rules to an area that more accurately reflects a station's core market.[32] In addition, the rule revision would permit common ownership of stations in neighboring communities, thus facilitating increased operating efficiencies. We seek comment on whether, given the substantial increase in video programming services available to the public and the increasing competition faced by broadcast television, the proposed change would promote competition without threatening local programming and ownership diversity.

19. We also seek comment on whether we should further modify our local ownership rules to permit common ownership of television stations with overlapping contours under certain limited circumstances.[33] For example, we could permit combinations involving only UHF stations, thus allowing the licensees of such stations to capture significant economies of scale with respect to administrative, newsgathering, and production functions. This alternative would limit mergers to the class of stations that are often handicapped by less favorable signal propagation characteristics and higher technical operating costs than VHF stations and that tend to be less profitable than their VHF competitors. Moreover, these stations are generally newer and not affiliated with one of the national broadcast networks.[34]

20. On the other hand, limiting the rule change to UHF stations alone would prevent mergers between strong VHF and weak UHF stations. Permitting such mergers might be effective in preserving or improving the service of UHF stations. Accordingly, we also seek comment on whether we should permit the combination of any two stations where one of the stations is a UHF facility and where a minimum number of separately owned television stations would remain after the proposed combination. A minimum of six independently owned stations, for example, would provide outlet capacity for ABC, NBC, CBS, Fox, and two independents.[35] Or, as in our recent revision of the radio rules,[36] should the number of stations in a market that one entity is allowed to own be staggered according to the total number of stations in the market? We invite comment on these and other proposals that might encourage innovative business arrangements that increase the competitiveness of stations but do not undermine our interest in diversity.[37]

V. TIME BROKERAGE AGREEMENTS

21. In the radio ownership proceeding, we adopted new rules designed to limit time brokerage agreements that appear to thwart the purpose of our national and local radio ownership rules.[38] Specifically, we provided that a licensee's time brokerage of any other station in the same market for more than 15 percent of the brokered station's

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[31] *Revision of Radio Rules and Policies, supra* note 26, at paras. 32, 37-38.

[32] There exists one pending television duopoly case involving Grade B (but not Grade A) overlap where divestiture has been required by the Commission--Rochester, NY (WUHF-TV). *Memorandum Opinion and Order,* File No. BALCT-890829KF, 5 FCC Rcd 3842 (1990), *extension granted,* 6 FCC Rcd 7479 (1991) (until Dec. 20, 1992). We will toll our previous divestiture schedule pending the outcome of this proceeding.

[33] In this regard, commenters are asked to address the appropriate interplay between the proposal to move from a Grade B to a Grade A contour standard and the proposals to increase the number of local television broadcast stations an entity may own in the same market. Specifically, we seek comment on whether modifications to the numerical limits should be implemented in the event that we also decide to use a new Grade A contour standard.

[34] We invite comment on whether we should limit the number of UHF facilities that could combine under such an approach and whether we should require that a minimum number of separately-owned television stations remain in the market after formation of such a combination. *See* para. 20, *infra.*

[35] Arbitron data indicate that this criterion would permit mergers in 38 of the top 50 markets.

[36] *See Revision of Radio Rules and Policies, supra* note 26, at para. 40.

[37] We note that several of the proposed changes to the duopoly rule are premised on a distinction between VHF and UHF stations. As the broadcast industry makes a transition to ATV technology, however, such distinctions ultimately may disappear (*e.g.,* in the event that all ATV stations are eventually moved to one band or another). To the extent this scenario unfolds, we will of course evaluate the impact of such changes on any revised ownership rules adopted in this proceeding. Commenters should address whether any UHF/VHF distinction would be appropriate in light of the potential transition to ATV technology.

[38] *Revision of Radio Rule and Policies, supra* note 26, at paras. 64-65.

broadcast hours per week would result in counting the brokered station toward the brokering licensee's national and local ownership limits. While we are concerned about the overall effect of time brokerage or "local marketing" agreements on competition and diversity in broadcast television, we are aware of only a handful of such agreements in the industry.[39] Therefore, we seek comment on the extent to which time brokerage or LMAs are a pervasive phenomenon in television, whether they present the same competitive and diversity concerns we found in the radio industry and whether we similarly should restrict them in some fashion in the television station context if we substantially relax the television local ownership rules.

VI. RADIO-TELEVISION CROSSOWNERSHIP RULE

22. *Background.* Section 73.3555(b) of the Commission's rules prohibits a party from holding cognizable ownership interests in a radio station and a television station located in the same market.[40] Note 7 to Section 73.3555, which was adopted in 1989, states that it is the Commission's policy to look favorably upon requests for waiver of this rule if the combination would occur in one of the top 25 television markets and 30 separately owned, operated, and controlled broadcast licensees would remain after the combination, or if the request involves a "failed" station. Requests for waivers on other grounds are evaluated according to five factors: (1) the potential benefits of the combination; (2) the types of facilities involved; (3) the number of stations already owned by the applicant; (4) the financial difficulties of the station(s); and (5) the nature of the market in light of competition and diversity concerns.

23. Section 73.3555(b) was first adopted in 1970.[41] The Commission viewed this rule as a logical extension of its duopoly rule, and stated its belief that diversity of viewpoint was best served by diversifying broadcast station ownership.[42] Nevertheless, the Commission did not commit itself irrevocably to this approach, if "some other relevant public interest consideration is found to outweigh the importance of diversifying control.[43] In 1989, the Commission, recognizing that radio/TV station combinations may give rise to significant economic efficiencies in station operations and that these efficiencies would ultimately redound to the benefit of broadcast audiences, adopted both the Top 25 markets/30 voices and "failed station" presumptions for radio/TV crossownership waivers noted above.[44] The Commission concluded that the potential harm from crossownership in such markets was so small, and the potential benefits, including greater diversity of viewpoints, so significant, that a cautious relaxation of the rule would serve the public interest.

24. More recently, the Commission adopted new radio ownership rules, which allow a single licensee to own between three and six radio stations in the same local market, depending on market size.[45] This decision was based on our findings that the radio industry had become highly fragmented, that an appropriate regulatory response was to allow radio licensees to enjoy the efficiencies stemming from greater group ownership, and that permitting limited ownership consolidation would enhance radio's ability to serve the public without diluting competition and diversity in local media markets.

25. *Comments.* Only a handful of commenters addressed the one-to-amarket rule specifically. Broadcasters (including group owners) and the Association of Independent Television Stations (INTV) urge elimination of the rule.[46] They argue that because of additional outlets of local programming, the rule is no longer necessary to promote diversity. In addition, they point out that repeal of the rule would permit consolidation of administrative operations, thus reducing costs, and would lead to more diverse and locally-targeted programming. INTV argues that elimination of the rule would place broadcasters on more equal footing with cable operators and save imperiled UHF and AM licensees.[47]

26. Opponents of relaxation or repeal of this particular rule (*e.g.* TRAC) argue that the rule should be retained because the danger of concentration is especially great at the local level. Several commenters, including MPAA, OC/UCC, and USCC, generally oppose any changes in the television broadcast ownership rules.[48]

27. *Proposals.* Because of the growth of cable services and the increase in the number of both radio and television stations, our local ownership rules alone may be sufficient to ensure competitive and diverse radio and television markets. In this regard, we note that even small markets have a considerable number of television and radio stations and other sources of programming. For example, in markets ranked between 126 and 150 on the basis of their Areas of Dominant Influence (ADIs), there are, on average, six over-the-air broadcast television signals and 18 radio signals. Accordingly, one approach to modi-

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[39] A recent survey of broadcast stations conducted by the Commission's Field Operations Bureau indicated that time brokerage is not a widespread practice in the television industry. Of 284 stations surveyed, only 17 (or 6 percent) engaged in time brokerage; only 1 of the 17 was a television station. *Public Notice,* "Broadcast Station Time Brokerage Survey Completed," Mimeo No. 21878 (Feb. 14, 1992).

[40] A television station and a radio station are deemed to be in the same market if the 2 mV/m groundwave contour of an AM station, or the 1 mV/m contour of an FM station, encompasses the entire community of license of the television station. In addition, a television and radio station are deemed to be in the same market if the Grade A contour of the television station encompasses the entire community of license of the radio station. This rule is also referred to as the "one-to-a-market" rule.

[41] *First Report and Order* in Docket No. 18110, 22 FCC 2d 306 (1970), *on reconsideration* 29 FCC 2d 662 (1971).

[42] 22 FCC 2d at 310.

[43] *Id.* at 311.

[44] *Second Report and Order* in MM Docket 87-7, 4 FCC Rcd 1741 (1989), *on reconsideration* 4 FCC Rcd 6489 (1989).

[45] *Revision of Radio Rules and Policies, supra* note 26. For example, in markets with 40 or more radio stations, a single entity may own up to 3 AM and 3 FM stations with up to a 25 percent combined audience share; by contrast, in markets with fewer than 15 radio stations, a single licensee may own up to 3 stations, no more than 2 of which may be in the same service, provided that the owned stations represent less than 50 percent of the stations in the market.

[46] Associated Broadcasters and Galloway Media Comments at 7; Bonneville International Corporation Comments at 5; Clear Channel Communications Comments at 2; NAB Comments at 31.

[47] INTV Comments at 31.

[48] MPAA Comments at 3; OC/UCC Comments at 28; USCC Comments at 2.

fying our local ownership rules would be to permit consolidation of radio and television ownership under the respective rules for each service without the additional limitation of a "one-to-a-market" rule. We invite comment on whether this approach would best serve our public interest goals.

28. At the same time, given that we have just relaxed the radio ownership rules and are considering in this proceeding proposals to relax the duopoly rule for television, we also seek comment on a more moderate approach which would permit ownership of one AM, one FM, and one television station in a market.[49] This alternative would allow broadcasters to achieve efficiencies from consolidated operation but also would limit local cross-service ownership. A third, more cautious approach would be to eliminate the one-to-a-market rule only for TV/AM combinations. This option would provide benefits of consolidation to both television stations and the AM service. A fourth approach would be to codify the waiver criteria adopted in 1989 and apply them to any market, not just the top 25, in which 30 "independent voices" would remain. Arguably, there is sufficient competition and diversity in any market with 30 independent voices, whether or not it is a top 25 market. Codifying the waiver criteria in this manner would give broadcasters greater flexibility and save both Commission and applicant resources that are now spent on such waiver requests. Finally, commenters are invited to propose other approaches to modifying this rule, indicating how their proposal would promote a financially viable and diverse set of competitors in the local media distribution market.

VII. DUAL NETWORK RULE

29. *Background.* Under the Commission's rules, a television station cannot affiliate with a network that operates more than one network if the networks operate simultaneously and serve substantially overlapping geographic areas. This "dual network" rule, § 73.658(g), was adopted in the *Chain Broadcasting Report* in 1941.[50] The rule was directed at NBC, the only company then with two radio networks. The Commission found that operation of two networks gave NBC excessive control over its affiliates because their contracts did not specify whether a station was part of the Red or Blue network. Moreover, the Commission concluded that operation of two networks gave NBC an unfair competitive advantage over other networks and protected it against future competition.[51] The Commission extended the dual network rule to television networks in 1946.[52] In 1977, the Commission repealed the rule for radio after concluding that the tremendous increase in the number of radio stations, the greatly lessened economic importance of networks, and the change in the type of network programming (from half-hour or longer entertainment programming to periodic news and information segments of five minutes) rendered the rule an arbitrary restraint on stations' freedom to schedule network programming.[53]

30. *Comments.* NBC, CBS, ABC, and NAB argue that the dual network rule should be repealed because the rule is allegedly outdated; according to these commenters, the abuses it was designed to prevent can no longer occur, and the radically changed circumstances that warranted repeal of the rule for radio broadcasters now warrant similar repeal for television broadcasters. These parties further claim that the prohibition will prevent broadcast networks from taking full advantage of emerging technology, such as video compression, that would enable the network to time-shift programming and to create programming that meets the demands of more specialized, narrow segments of the television audience. They contend that application of video compression technology would not only permit efficient use of the spectrum but also encourage competition and diversity of program service. These commenters point to the fact that new networks, broadcast and cable, have been created as proof that existing network organizations cannot foreclose entry.[54]

31. Opposing commenters argue that the dual network ban should be left in place to ensure both program diversity and the existence of a competitive marketplace for viewers and programming. MPAA contends that only a few companies could provide a second network in the foreseeable future, and there is no benefit in permitting these companies to lock up distribution channels that should remain available for new, independent programming sources.[55]

32. *Proposal.* As our review of the changing video environment indicates, one of the principal developments taking place is the growth of multiple channel service providers.[56] Such providers enjoy certain economies of

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[49] Absent a waiver, this approach would preclude group owners that acquire more than an AM-FM combination in a given market from acquiring a television station serving the same area. Given the recent relaxation of our local radio ownership rules, we invite comment on whether further accommodation of group radio owners in a newly crafted one-to-a-market rule is appropriate. *See Revision of Radio Rules and Policies, supra* note 26.

[50] *Report on Chain Broadcasting,* Docket No. 5060 (1941) (*Chain Broadcasting Report*). Section 303(i) of the Communications Act of 1934, 47 U.S.C. § 303(i), gives the Commission explicit authority to regulate chain broadcasting, which is defined in § 3(p) of the Act as the "simultaneous broadcasting of an identical program by two or more connected stations." 47 U.S.C. § 153(p). The Commission first exercised this authority in 1941, when it adopted the *Chain Broadcasting Report.* In addition to the dual network rule, the *Report* adopted a number of regulations, all but one of which is still in effect in some form today. The rules were adopted to redress the "unhealthy predominance" of the network organizations by eliminating arbitrary and inequitable network practices. These standard practices, in the Commission's view, stifled competition and made the local station a servant of the network rather than of the public interest. The Commission believed that licensees should be more independent if they were to fully serve the public interest. *Chain Broadcasting Report, supra,* at 97. The Supreme Court upheld the chain broadcasting rules in 1943. *NBC v. United States,* 319 U.S. 190 (1943).

[51] *Chain Broadcasting Report, supra* note 49, at 70-73.

[52] *Amendment of Part 3 of the Commission's Rules,* 11 Fed. Reg. 33 (January 1, 1946).

[53] *Report, Statement of Policy, and Order* in Docket No. 20721, 63 FCC 2d 674, 677, 685 (1977).

[54] NBC Comments at 53; ABC Comments at 27; CBS Reply Comments at 5; NAB Comments at 46.

[55] MPAA Comments at 17.

[56] *OPP report, supra* note 1, at 4004.

scale and marketing advantages. But broadcasters and broadcast networks seeking to become multichannel service providers have confronted certain regulatory barriers to doing so, and those barriers appear to have channeled the networks' activities into non-broadcast enterprises. While Commission rules prohibit dual networking in the television broadcast context, television networks today can and do provide or participate in multiple networks distributed over cable. For example, NBC operates CNBC and will provide multiple channels of Summer Olympic feeds to cable systems. Capital Cities/ABC owns a substantial share of the ESPN and Arts & Entertainment (A&E) cable services.

33. We note that, with the advancement of satellite technology and associated video compression, the television networks could become multichannel competitors by introducing a multiple channel network and making more efficient use of their existing network distribution facilities. To the extent the dual network rule forestalls such innovations that would enhance program diversity and competition and increase the efficiency of spectrum usage, the rule may be disserving the public interest, especially since the television networks have the resources to invest in technological development and the ability to supply programming for additional channels. In addition, the rule may restrict the networks' use of their news gathering and other resources in ways that hamper their ability both to compete with multichannel service providers and to service local broadcast outlets. The existing multinetwork operations of the Home Shopping Network, provided under an FCC waiver, demonstrate some of this potential, *i.e.*, operation of an alternative late-night network available to a separate group of affiliates.[57] The rule may inhibit the creation of alternative language feeds or time-shifting networks of the type developing in the cable industry. Moreover, the coverage of the rule may be unduly broad, since it uses a definition that includes even small regional networks, which might, for example, distribute alternative sports events on a regional basis.

34. Finally, development of satellite technology has made it easier to create networks, and many networks now compete with ABC, NBC, and CBS. For example, the Fox Broadcasting Company, launched five years ago, now has approximately 130 affiliates (ABC, NBC, and CBS each have approximately 200). The number of national basic cable networks increased from 34 in 1982 to 80 in 1990. As of 1990, there were also 9 national pay cable networks, 8 national pay-per-view services, and 38 regional networks. In addition, distribution systems exist for first-run syndicated programming. In the context of this multiplicity of network and other program sources, we believe that repeal of the dual network rule might expand the flexibility available to existing broadcast program providers with little risk to diversity.[58] We seek comment, however, on the possibility that eliminating the rule would prevent entry of new, independent programming sources, which are more likely to lack (or to require more time to arrange for) the funds needed to create a full complement of programming for new distribution channels. We also seek comment on the possible effect of this proposal on network-affiliated and independent broadcast television stations and whether any safeguards might be needed to counteract possible anticompetitive conduct.

VIII. OTHER NETWORK RULES

35. **Network ownership of stations.** Section 73.658(f) of our rules provides that a network or an entity controlled by a network cannot own television stations in areas where there are few television stations or the stations are of such unequal desirability that competition would be restrained by allowing such licensing.

36. *Background.* This rule was also adopted in the *Chain Broadcasting Report*[59] to prevent radio networks from dominating smaller markets. The Commission found that ownership of stations by networks renders them inaccessible to competing networks, and this "bottling up" of the best facilities discouraged the creation and growth of new networks.[60] Along with the other chain broadcasting rules, it was made applicable to television in 1946.[61] The rule has never been applied to prevent a network purchase of a station, although the issue was raised in six cases.[62]

37. *Proposal.* In view of the radical changes in the television marketplace since 1946, we request comment on repealing this rule. In this regard, we note that even stations in the smallest markets are subject to significant competition today, whether from other broadcast stations, cable, satellite dishes, other multichannel competitors, or VCRs. Moreover, network ownership might allow a struggling station to survive. We thus seek comment on the following questions: Is there any basis to assume that a network could achieve an unfair competitive advantage

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[57] *Memorandum Opinion and Order* in the Matter of the Applicability of 47 CFR §73.658(g) and 47 CFR §73.658(k) to Home Shopping Inc., 4 FCC Rcd 2422 (1989). Home Shopping Network provides a 24-hour network service, HSN2, to 23 UHF stations and an overnight programming service, HSN Overnight, to 19 UHF stations. In granting the waiver, the Commission found that simultaneous operation of the two networks would not threaten either program diversity or competition in the advertising market; the actual amount of simultaneous operation averaged only 3.7 hours per 24 hour period in a limited number of markets, and HSN's operations were not dependent on advertising revenue. Moreover, the waiver was consistent with the Commission goal of encouraging alternatives to traditional networking. *Id.* at 2423.

[58] We have proposed waiver of the rule in certain respects to accommodate the implementation of HDTV in the Advanced Television proceeding. *Second Report and Order and Further Notice of Proposed Rulemaking* in MM Docket 87268, 7 FCC Rcd 3340 (1992).

[59] *Chain Broadcasting Report, supra* note 49.

[60] *Id.* at 67.

[61] *See* note 51, *supra*. In 1946, there were only six television stations in the entire United States. Today, the average television market has approximately seven licensed stations and over half of all households receive more than ten over-the-air television signals.

[62] *See General Times Television Corp.*, 13 RR 499 (1956); *New Britain Broadcasting Co.*, 21 FCC 958 (1956); *Hyman Rosenblum*, 22 FCC 1432, 1441 (1957); *St. Louis Telecast, Inc.*, 22 FCC 625, 738 (1956); *Biscayne Television Corp.*, 22 FCC 1464, 1465 (1957); and *National Broadcasting Co., Inc.*, 44 FCC 2098 (1960). For a discussion of these cases, *see* L. A. Powe, Jr., "FCC Determinations on Networking Issues in Multiple Ownership Proceedings," at 5159 (August 1979) in Network Inquiry Special Staff, *Preliminary Report on Prospects for Additional Networks* (Feb. 1980).

over the other station owners, including large group owners, that are not subject to this restriction? Would allowing networks into the smallest markets bring better service to the public? Is there a need for this separate rule in addition to our duopoly and one-to-a-market rules?

38. **Broadcast of the programs of more than one network.** Section 73.658(l) of our rules provides that in television markets in which two stations have already affiliated with two of the three major networks and in which there are one or more independent stations with reasonably comparable facilities, the network without an affiliate in that market must first offer its programming to the independent station before offering it to the affiliated stations.

39. *Background.* This rule was adopted in 1971 to prevent network bias against primary affiliations with independent stations (particularly UHF stations) in favor of secondary VHF affiliations.[63] The practical effect of the rule is to force the third network to affiliate with the UHF station. The rule was adopted to address a situation existing in two markets--Raleigh-Durham, NC and Augusta, GA--with two VHF network affiliates and one UHF independent. Proponents of the rule argued that it was detrimental to the Commission's objective of fostering UHF development to allow one or both of the VHF stations in the market to choose among the program offerings of two networks, leaving the UHF station (which would already have been at a handicap with respect to its VHF competitors) with the less desired programming.[64] Even that programming was subject to "recapture" if the VHF station decided to clear it.[65] Moreover, some VHF stations were taking the programming of two different networks shown at the same time, and delaying the broadcast of one of the programs by almost as much as a week. Networks countered that the audience that a UHF station can deliver is so small as not to represent a viable alternative to a VHF station, and the only result will be a loss to the public of certain programming. Moreover, the networks contended that such "sheltering regulation" would remove an incentive to UHF stations to improve their facilities.[66]

40. The Commission concluded that the public interest required adoption of the rule. It found that guaranteeing UHF stations access to a larger quantity of desirable network programs, and to the most desirable programs of one of the networks, on a regular and continuing basis would provide the audience flow essential to enabling the UHF service to become viable and competitive and make a permanent contribution to the full development of the nation's television system. The Commission also believed that the public would benefit because network programming would be broadcast at more convenient times. While some who could not receive a UHF signal would lose access to programming previously carried on a VHF station, the Commission concluded that the technical differences were diminishing and the rule was limited by its terms to situations where the UHF and VHF facilities were "reasonably comparable."[67]

41. *Proposal.* This rule was adopted to provide independent stations enhanced access to programming. Given the great increase in the supply of programming since the rule's adoption in 1971, we question whether any valid reason remains for this rule limiting the options of networks as "sellers" of network programming and local television stations as "buyers" of that programming. On the other hand, network programming may be so commercially valuable that providing independent stations access to such programming in the circumstances covered by this rule may be viewed as enhancing their ability to compete. We thus seek comment on whether market changes now warrant our repealing the rule.

IX. CONCLUSION

42. We seek comment on a wide range of options for altering our television rules so that our regulations keep pace with a significantly changed video marketplace. We ask commenters to provide facts, data, and studies to bolster their arguments concerning which of the rules should be retained, relaxed, or repealed.

X. ADMINISTRATIVE MATTERS

Ex Parte Rules--Non-Restricted Proceeding

43. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

44. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before August 24, 1992, and reply comments on or before September 23, 1992. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

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[63] *First Report and Order* in Docket No. 18927, 28 FCC 2d 169 (1971). We note that since 1971 the number of television stations has grown from 881 to 1494, an increase of 70 percent.

[64] The UHF station was faced with another disadvantage: it was forced to fill its schedule with often more expensive and less popular syndicated programming. *Id.* at 172.

[65] *Id.* at 169-170.

[66] *Id.* at 177.

[67] *Id.* at 190-192.

Initial Regulatory Flexibility Analysis

45. **Reason for the Action**: This proceeding was initiated to review and update the Commission's national and local television ownership rules, certain television crossownership rules, and certain rules governing the television broadcast networks.

46. **Objective of this Action**: The actions proposed in this *Notice* are intended to relax some of the national and local ownership and crossownership restrictions on television broadcasters, and certain business restrictions on the broadcast television networks, to enable them to adjust to the changing communications marketplace, and to better respond to the needs of the public.

47. **Legal Basis**: Authority for the actions proposed in this *Notice* may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

48. **Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule**: None.

49. **Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule**: None.

50. **Description, Potential Impact and Number of Small Entities Involved**: Approximately 2700 existing television broadcasters of all sizes may be affected by the proposals contained in this decision.

51. **Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives**: The proposals contained in this *NPRM* are meant to simplify and ease the regulatory burden currently placed on commercial television broadcasters.

52. As required by § 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *NPRM* but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rulemaking*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981)).

Additional Information

53. For additional information on this proceeding, contact Beverly McKittrick, Mass Media Bureau, (202) 632-5414.

XI. ORDERING CLAUSE

54. IT IS ORDERED that the temporary waiver of Section 73.3555(a)(3) of the Commission's rules granted Act III Broadcasting of Rochester, Inc. is FURTHER EXTENDED until Commission action with respect to Section 73.3555(a)(3) in this proceeding becomes final.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS

Initial Comments

1. Abry Communications
2. Associated Broadcasters, Inc. and Galloway Media, Inc.
3. Association of America's Public Television Stations and the Public Broadcasting Service
4. Association of Independent Television Stations, Inc. (INTV)
5. Bonneville International Corporation
6. Capital Cities/ABC, Inc.
7. CBS, Inc.
8. Cedar Rapids Television Company, Jefferson-Pilot Communications Company of Virginia, Jewell Television Corp., Lanford Telecasting Co., Inc., Marsh Media, Inc., Marsh Media Of El Paso and WTZA-TV Associates
9. Clear Channel Communications, Inc.
10. Community Broadcasters Association
11. Corporation For Public Broadcasting
12. ESPN, Inc.
13. Fisher Broadcasting Inc.
14. Fox Broadcasting Company
15. Freedom Of Expression Foundation, Inc. and The Media Institute
16. Gaston Taxpayers Association
17. General Instrument Corporation
18. Great American Television And Radio Company, Inc.
19. Group One Broadcasting
20. Home Shopping Network, Inc.
21. Motion Picture Association Of America, Inc. (MPAA)
22. Motorola Inc.
23. National Association Of Broadcasters (NAB)
24. National Broadcasting Company, Inc. (NBC)
25. National Cable Television Association, Inc. (NCTA)
26. National Football League
27. National Telephone Cooperative Association
28. Network Affiliated Stations Alliance (NASA)
29. Office Of Communication Of The United Church Of Christ (OC/UCC)
30. Pinelands, Inc.
31. Radio-Television News Directors Association
32. Tele-Communications, Inc. (TCI)
33. Teledemocracy Project
34. Television Operators Caucus, Inc.
35. Tribune Broadcasting Company
36. United States Catholic Conference (USCC)
37. Univisa, Inc.
38. Westinghouse Broadcasting Company, Inc.
39. WTZA-TV Associates

Reply Comments

1. Association of Independent Television Stations, Inc. (INTV)
2. Capital Cities/ABC, Inc.
3. CBS, Inc.
4. Community Broadcasters Association
5. Fox Broadcasting Company
6. King World Productions, Inc.
7. Land Mobile Communications Counsel
8. Major League Baseball
9. Motion Picture Association of America, Inc.
10. National Broadcasting Company, Inc.
11. National Cable Television Association, Inc.
12. Network Affiliated Stations Alliance
13. Press Broadcasting Company, Inc.
14. Program Producers and Distributors Committee
15. Tele-Communications, Inc. (TCI)
16. Telecommunications Research and Action Center and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights (TRAC)
17. Tribune Broadcasting
18. Silvia Stagg
19. Women Against Military Madness (WAMM) Media Watch

SEPARATE STATEMENT
OF
COMMISSIONER ERVIN S. DUGGAN

In the Matter of Review of the Commission's Regulations Governing Television Broadcasting (MM Docket No. 91-221)

When we adopted the Notice of Inquiry in this docket, I said that I fully supported reviewing the Commission's rules and policies in light of the rapidly changing conditions in the video marketplace. In particular, I believe the FCC should do all that it can to help free, over-the-air television broadcasters compete against multichannel video providers with a dual revenue stream. A new framework for station ownership may, in fact, help promote that competition. I certainly see no harm in asking the question, particularly in terms of the relatively moderate proposals set forth in this Notice.

However, as I noted in my separate statement in the Radio Rules proceeding last March, I do not assume that actions that are appropriate for the highly fragmented and economically embattled radio industry are necessarily advisable here. To be sure, the television marketplace is changing, as the study of the Office of Plans and Policy made clear. Whether greater concentration of television station ownership is the appropriate regulatory response, however, is very much an open question for me. I will be most interested, therefore, in the comments that discuss the Notice's ownership proposals in the context of the industry's long-term financial picture.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re:

Exclusive Jurisdiction
With Respect to Potential
Violations of the Lowest Unit
Charge Requirements of Section
315(b) of the Communications
Act of 1934, as amended

ORDER ON RECONSIDERATION

Adopted: May 14, 1992; Released: June 12, 1992

By the Commission: Commissioner Quello issuing a statement.

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I. INTRODUCTION

1. In this Order, we deny two petitions for reconsideration of our *Declaratory Ruling* in this proceeding.[1] In that decision, we held that federal law preempts state causes of action dependent on any determination of the "lowest unit charge" under Section 315(b) of the Communications Act, or of some other duty arising under that subsection.[2] Petitions for reconsideration were filed jointly by certain candidates for public office in Georgia and Alabama and their respective campaign committees. In denying the petitions, we affirm in its entirety the holding of the *Declaratory Ruling* and the analysis set forth therein.

II. BACKGROUND

2. We issued the *Declaratory Ruling* in conjunction with our comprehensive examination of Commission guidelines and regulatory policies regarding broadcaster and cable operator practices with respect to the sale of political programming and advertising time to political candidates.[3] Our decision to consider issuing a declaratory ruling regarding Section 315(b) was prompted by litigation in several states where candidates for elective office had sued broadcast stations for charging rates allegedly in excess of those permitted under Section 315(b) and the inconsistent court rulings with regard to jurisdiction resulting from such litigation. Accordingly, we issued a *Public Notice* in October 1991 stating that we were considering issuing, on our own motion, a declaratory ruling confirming that the Commission has exclusive jurisdiction to determine questions of liability for violations of Section 315(b) and inviting public comment on several related issues.[4]

3. After examining comments filed by interested persons in response to the *Public Notice*, we issued the *Declaratory Ruling* on December 13, 1991,[5] preempting "any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) of the Communications Act, or of some other duty arising under that subsection. . . ."[6] We further declared that "[t]he sole forum for adjudicating such matters shall be this Commission."[7] The preemption encompassed both determinations of liability under Section 315(b) and remedies for enforcing the statute.[8] Additionally, we established procedures governing complaints against broadcast stations filed with the Commission alleging violations of the lowest unit charge requirements of Section 315(b).[9]

4. Petitioners filed the instant petitions for reconsideration on January 15, 1992. We published public notice of the petitions in the *Federal Register*[10] and established a pleading cycle in accordance with Section 1.429 of our rules.[11] Oppositions were filed by three groups of broadcasters, and the petitioners replied.[12]

III. DISCUSSION

5. Petitioners maintain that the Commission erroneously concluded that Congress by implication preempted state causes of action which include as an element alleged violations of Section 315(b). Petitioners further contend that the Commission lacks authority to confer upon itself exclusive jurisdiction over matters related to Section 315(b). Finally, petitioners assert that the procedures established by the Commission are not adequate to enforce the rights of candidates and would stand as an obstacle to the realization of the full objectives of Congress in enacting Section 315(b). Accordingly, petitioners seek reconsideration and withdrawal of the *Declaratory Ruling*. We consider and reject petitioners' arguments below.

A. Preemption of State Causes of Action Involving Breaches of Duties Arising Under Section 315 (b)

1. Congressional Preemption

6. Our preemption ruling was based, first, on a finding that Congress by implication preempted state causes of action dependent on any determination of the lowest unit charge under Section 315(b), or of some other duty arising under that subsection. Specifically, we found that: (1) the purpose of the federal law and the character of its obligations reveal a congressional intention to preempt such causes of action; (2) allowing such actions to proceed in state courts would result in potentially inconsistent interpretations of federal law; and (3) such actions would stand as an obstacle to the realization of the full objectives of Congress.[13] Petitioners challenge each of these findings, which we reaffirm below.

a. Congressional Intent

7. Petitioners assert that a proper analysis of congressional intent regarding preemption must focus exclusively on the Federal Election Campaign Act of 1971 ("FECA"), which enacted the current version of Section 315(b), and its legislative history. The legislative history of FECA, petitioners maintain, is silent regarding any congressional purpose to provide uniform regulation of broadcast issues by the Commission. Petitioners also contend that the legislative goals of FECA, and therefore Section 315(b), are different from those of the Communications Act of 1934. The basic thrust of petitioners' argument is that the Commission improperly examined Section 315(b) in the context of the general regulatory scheme adopted by the Communications Act of 1934 rather than relying solely on the purposes and objectives of FECA and its legislative history.[14]

8. We are not persuaded by this argument. Petitioners, in effect, ask us to disregard a fundamental purpose of the Communications Act to provide a uniform scheme of federal regulation and enforcement over radio communications matters simply because the lowest unit charge provision of the Act was added as part of FECA. This ignores the fact that Congress elected to adopt Section 315(b) as an amendment to the Communications Act and fit it within the existing structure of that statute. We thus reject the notion that the lowest unit charge provision of Section 315(b) must be considered in isolation either from other provisions of Section 315 or other sections of the Communications Act that demonstrate congressional intent with regard to the overall scheme of broadcast regulation and the Act's enforcement. Rather, Section 315(b), which is an integral part of the comprehensive regulatory and enforcement scheme regarding broadcasting contained in the Communications Act, properly is examined within the context of the statute in which Congress chose to codify it. In this regard, we thoroughly examined in the *Declaratory Ruling* the nature and purpose of the comprehensive and centralized statutory scheme governing broadcasting set forth in the Communications Act, including the express statutory language providing that the Commission shall execute and enforce the provisions of the Act.[15] For the reasons set forth in the *Declaratory Ruling*, we affirm our prior conclusion that "the purpose of the federal law and the character of its obligations reveal an intention to preempt [state] causes of action" involving alleged violations of Section 315(b).[16]

9. We agree with petitioners that the legislative history and statutory objectives of FECA also are relevant to the preemption analysis; however, as we found in the *Declaratory Ruling*, they too support our decision to preempt. In this regard, we discussed in the *Declaratory Ruling* relevant portions of FECA's legislative history. For example, we cited language from the Senate report revealing that Congress expressly relied upon the assurances of the then-Chairman of the FCC that the "broadcast provisions" of FECA would be enforceable by the Commission.[17] Congress's reliance on this statement indicates its clear understanding that the Commission would be the body responsible for enforcing Section 315(b). Moreover, by ensuring uniform interpretation and enforcement of Section 315(b), preemption will further the expressed objectives of Congress in enacting FECA -- "to give candidates for public office greater access to the media" and "to halt the spiraling cost of campaigning for public office."[18]

10. Congress also vested in the Commission explicit authority to implement and enforce the substantive requirements of Section 315 -- authority that was not diminished in any way in the adoption of FECA.[19] As the United States Court of Appeals for the District of Columbia Circuit has noted, the authority contained in Section 315(d) "amounts to a congressional direction to the FCC to recognize the importance of this particular section of the statute and to prescribe separate rules and regulations to deal with the multitudinous situations that arise in applying it to all federal, state and local candidates for office throughout the nation."[20] This explicit grant of enforcement authority reinforces our conclusion that Congress intended the Commission, and not the many state courts, to resolve any issues concerning the lowest unit charges for the broadcast of political advertisements.

11. We reject petitioners' claim that because the language of Section 315(d) was enacted prior to the lowest unit charge requirement of Section 315(b), subsection (d) does not reveal any congressional intent with respect to subsection (b).[21] Petitioners once again ignore the context of the statute and unpersuasively suggest that we view separate subsections of Section 315 in isolation. By placing the lowest unit charge requirement in Section 315, Congress clearly intended the existing Rule Making authority contained in subsection (d) to apply to subsection (b),[22] and petitioners have cited nothing that suggests otherwise. Moreover, the lowest unit charge requirement was merely a change in the standard for measuring the lawfulness of charges for political advertisements. Section 315(b) itself existed long before Congress enacted FECA. Prior to the FECA amendment, that provision limited the rates for political advertising to "the charges made for comparable use of such station for other purposes."[23] There is no basis for concluding that in amending that standard in Section 315(b) to include the "lowest unit charge" concept, Congress in the FECA intended to deprive the Commission of its existing authority under Section 315(d) to enforce all the substantive requirements of Section 315. Indeed, in our view, the explicit enforcement authority contained in Section 315(d) is strong evidence of Congress's intent to provide for uniform implementation and enforcement of subsection (b).

12. Similarly, we reject petitioners' assertion that we improperly relied on *Belluso v. Turner Communications Corp.*[24] to support our conclusion that Congress by implication preempted state causes of action involving breaches of duties arising under Section 315(b).[25] As we noted in the *Declaratory Ruling*, in *Belluso* the court held that Congress had not intended to create a private federal cause of action for damages as a remedy for a violation of Section 315(a) of the Communications Act and had opted

instead for an exclusive administrative remedy.[26] Petitioners claim that *Belluso* is distinguishable because Section 315(a) was enacted as part of the original Communications Act, whereas the lowest unit charge requirement of Section 315(b) was added to the Act through FECA. As indicated above, we find such distinctions unpersuasive. We affirm our prior conclusion that the court's reasoning in *Belluso* is equally applicable to Section 315(b). Whether the statutory provision involved is Section 315(a) or Section 315(b), in our view the statute reveals a congressional intention to achieve uniform implementation and enforcement through this Commission.[27]

13. Finally, we reject petitioners' claim that Section 414 of the Act, which preserves remedies "now existing at common law or by statute,"[28] is inconsistent with a congressional desire to preempt state causes of action involving Section 315(b) determinations.[29] Such a "savings clause" does not preserve lawsuits that are predicated on a federal statutory right, rather than "existing" state common law.[30] A savings clause does not convert federal law claims into state causes of action.[31] Also, as we noted in the *Declaratory Ruling*, "such 'savings clauses' do not preclude preemption where allowing state remedies would lead to a conflict with or frustration of statutory purposes."[32] Moreover, the determination of whether a broadcaster has complied with its Section 315(b) "lowest unit charge" obligations involves resolution of "issues call[ing] for the type of administrative evaluations and conclusions that Congress has entrusted to the informed discretion of the Commission" and therefore is outside the scope of the savings clause. *See Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 330 (1981).[33] In this regard, we pointed out in the *Declaratory Ruling* that the Commission has been designated to enforce the lowest unit charge requirement "precisely because it has the expertise necessary to make such determinations based upon its understanding of the complex and often arcane practices of the broadcast industry."[34] Accordingly, we affirm our prior conclusion that Section 414 does not foreclose our preemptive action concerning Section 315(b).[35]

b. Potential for Inconsistent Interpretations

14. Petitioners next dispute our expressed concern that "[r]ulings by courts in numerous jurisdictions around the country almost certainly would produce varying and possibly conflicting determinations among state courts and between those courts and the Commission, thereby frustrating the objectives of certainty and uniformity."[36] Petitioners offer the following arguments in support of their contention that there is no danger of inconsistent interpretations of Section 315(b): (1) courts have little latitude in interpreting Section 315(b) because they act in an adjudicatory, rather than a Rule Making, context; (2) the regulations governing Section 315(b) are easily understandable and applied; (3) all interpretations of Section 315(b) are subject to ultimate review by the United States Supreme Court; (4) the inclusion of a federal statute as a standard in a state cause of action is not uncommon; and (5) the doctrine of primary jurisdiction is available to ensure uniformity, if necessary.[37]

15. These arguments are not persuasive. First, the fact that state courts would make determinations under Section 315(b) in an adjudicatory rather than a Rule Making role does not diminish the possibility of disparate rulings on the issues of liability and remedies. Multiple adjudications by numerous courts could easily produce inconsistent decisions in various jurisdictions, thereby creating inconsistent rights and responsibilities for political candidates and broadcasters, respectively. In addition, contrary to petitioners' position, Congress expressly recognized in enacting current Section 315(b) that "[t]he determination of what is a broadcasting station's lowest unit charge can be a very complicated matter."[38] Our recent effort to provide comprehensive guidance in this area[39] underscores the need to centralize interpretation and enforcement of the lowest unit charge requirement of Section 315(b) in order to achieve uniformity and certainty.[40]

16. We recognize that the Supreme Court has ultimate authority to review state court decisions, but this fact does not change our analysis.[41] As a practical matter, the Supreme Court cannot and certainly will not review a multitude of inconsistent state court decisions involving Section 315(b) determinations. Even if the Supreme Court were to review a particular state court ruling involving the lowest unit charge requirement, various other decisions by state courts would remain unaffected, or at least there could be extensive litigation and prolonged uncertainty as to whether those decisions were implicated by the Supreme Court's decision. We thus remain convinced of the potential for candidates and broadcasters to be subject to differing standards in different jurisdictions. Centralizing determinations of liability in this Commission will avoid this problem and avoid frustration of Congress's objective of ensuring uniform application and enforcement of the Act's provisions, including Section 315(b).[42]

17. We recognize, as petitioners observe, that state courts in some circumstances may be called upon to construe federal law in the context of hearing causes of action grounded in state law.[43] However, state court consideration of such matters is not permitted when Congress has preempted state law, nor when a federal agency acting within its authority has preempted state law. Since we have determined that Congress has by implication preempted state causes of action related to Section 315(b), and further, that we have independent authority to preempt such causes of action, which we have exercised,[44] state courts in this instance may not entertain determinations of liability and remedies under Section 315(b).[45]

18. We also are not persuaded by petitioners' argument that, if state court enforcement of Section 315(b) implicates concerns for uniformity, we should rely instead on the doctrine of primary jurisdiction in lieu of preemption. We have determined in this case that state court jurisdiction over lowest unit charge claims has been preempted totally by federal law. Primary jurisdiction would be applicable only if *both* the state courts and the Commission had jurisdiction over lowest unit charge controversies. That doctrine is a means of accommodating concurrent jurisdiction between courts and the Commission -- not a compromise situation that gives state courts jurisdiction over matters preempted by federal law. Furthermore, as the Supreme Court has noted, "[n]o fixed formula exists for applying the doctrine of primary jurisdiction."[46] There is thus no assurance that a particular court would refer the liability issue under Section 315(b) to the Commission in the first instance.[47] Moreover, we have determined that this procedure would not ensure uniform enforcement of Section 315(b), as courts would be free to fashion remedies inconsistent with those deemed appropriate by the federal agency charged with implementing and enforcing the statute. In extending the preemptive effect of the *DeclaratoryRuling* to remedies, we specifically found that

allowing state courts to impose additional remedies for violations of Section 315(b) might discourage broadcasters from carrying political advertising, thereby frustrating Congress's intent to foster dissemination of information regarding political campaigns.[48] We reject petitioners' suggestion that the doctrine of primary jurisdiction is an appropriate vehicle to ensure uniformity in this area.

c. State Actions as an Obstacle to the Realization of the Full Objectives of Congress

19. Finally, petitioners maintain that state actions would not stand as an obstacle to the realization of the full objectives of Congress in enacting Section 315(b), but rather would serve Congress's goal of reducing campaign spending.[49] In this regard, petitioners claim that administrative remedies available from the Commission would not be as effective because the Commission does not have authority to order that broadcasters pay refunds to candidates who are overcharged.[50]

20. Petitioners' argument ignores the breadth of the Commission's authority in this area. The Commission has a wide range of tools, including the authority to require rebates for overcharges, to ensure effective and uniform enforcement of Section 315(b). The Commission has upheld Mass Media Bureau actions in which rebates had been required and no broadcaster has ever challenged that authority.[51] Section 315(b) itself mandates that charges to candidates "shall not exceed" the lowest unit charge, and the Commission is charged with the responsibility to execute and enforce the Act's provisions.[52] In addition, Section 4(i) of the Act expressly authorizes the Commission to issue such orders "not inconsistent with this Act, as may be necessary in the execution of its functions."[53] Requiring broadcasters to return overcharges to candidates effectuates the express requirement of Section 315(b) and is well within the Commission's authority. The United States Court of Appeals for the District of Columbia Circuit has held in a different regulatory context that Section 4(i) authorizes the Commission to order refunds to enforce statutory requirements in the absence of express refund authority. *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989).[54] We conclude that we may require refunds to enforce the lowest unit charge provisions of Section 315(b) pursuant to our authority under Sections 1, 4(i) and 315(d) of the Act.[55]

2. Preemption as an Exercise of the Commission's Authority

21. As an independent basis for our action, we explained that, regardless of whether Congress expressly or by implication preempted state law claims based upon alleged violations of Section 315(b), substantial judicial precedent establishes that the Commission itself has authority to preempt such claims. *See, e.g., City of New York v. FCC*, 486 U.S. 57 (1988); *Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141 (1982). Consistent with this precedent, we concluded that preemption was well within our delegated authority under the Communications Act to enforce Section 315(b) and was necessary to achieve our purpose of ensuring uniform standards for interpreting and enforcing the lowest unit charge requirement. Accordingly, we exercised our independent authority to preempt state causes of action involving breaches of duties arising under Section 315(b) and declared that the Commission shall be the sole forum for adjudicating such matters.[56]

22. Petitioners argue that the Commission lacks authority to confer upon itself exclusive jurisdiction over Section 315(b) matters.[57] It is beyond dispute, of course, that "[a]n agency may not confer power upon itself." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986).[58] However, in preempting state causes of action related to Section 315(b), we are in no way conferring power upon ourselves but rather are acting pursuant to the authority granted us by Congress. As we explained in the *Declaratory Ruling*, the Communications Act's regulatory scheme setting forth Commission authority to enforce the Act, and the provisions of Section 315 specifically, provide the necessary delegation of authority to support our decision to preempt.[59] Consistent with *City of New York* and other Supreme Court decisions, the Commission may in proper circumstances determine "that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area."[60] In preempting state causes of action involving breaches of duties arising under Section 315(b) and declaring that the Commission shall be the sole forum for adjudicating such matters, we acted squarely within the authority delegated to us by Congress and in harmony with the standards enunciated by the Supreme Court in *City of New York* and related decisions.[61]

23. Finally, petitioners' attempts to distinguish *City of New York* and *de la Cuesta* are unavailing.[62] Petitioners maintain that, unlike the situation in those cases, here there is no conflicting state policy with respect to Section 315(b). To the contrary, as discussed above, we conclude that a multiplicity of state court rulings almost certainly would produce varying and possibly conflicting determinations among state courts and between those courts and the Commission.[63] Such a result necessarily would frustrate federal interpretation and enforcement of Section 315(b). Just as importantly, it would conflict with Congress's objective to create a unified scheme of regulation for communications by vesting in the Commission exclusive jurisdiction to enforce the Act, thereby leading to uniformity, certainty and consistency with respect to the lowest unit charge and other requirements of the Act. Additionally, inconsistent state court determinations of liability and remedies under Section 315(b) might well discourage broadcast stations from accepting political advertisements, thus frustrating a central congressional policy underlying Section 315(b) of encouraging greater and less costly access for candidates to broadcast facilities.[64] We therefore affirm our preemption decision.

B. Procedures Governing Complaints Alleging Section 315 (b) Violations

24. In the *Declaratory Ruling*, we found that setting out a procedural framework for ruling on Section 315(b) complaints "will further our ability to promptly and fairly dispose of Section 315(b) complaints brought to us as a consequence of this ruling . . . ."[65] Accordingly, we established procedures which set forth pleading requirements for making a *prima facie* case, established pleading timetables, provided for limited discovery of station records pertaining directly to the complaint, and offered parties the opportunity to pursue mediation as an alternative to adjudication of a complaint by the Mass Media Bureau.[66] As discussed below, we affirm those procedures in their entirety.

25. Petitioners contend that the procedures set forth in the *Declaratory Ruling* are inadequate because they are not the same as those afforded litigants under state law and the

Federal Rules of Civil Procedure.[67] However, there is no requirement in either the Communications Act or the Administrative Procedure Act ("APA")[68] that the Commission's procedures replicate procedures available to civil litigants in state or federal courts, and petitioners offer no authority for such a proposition. Civil court procedures necessarily are drafted broadly so as to accommodate a wide variety of civil causes of action. In contrast, we are concerned here with alleged violations of a specific provision of the Communications Act. On the basis of our experience in enforcing Section 315(b), we were able to craft procedures designed expressly to facilitate resolution of such claims.[69]

26. We likewise reject petitioners' assertion that our Section 315(b) procedures conflict with the APA and the Commission's existing procedural rules.[70] Section 315 does not require lowest unit charge disputes to be determined "on the record after opportunity for an agency hearing."[71] The procedures governing adjudications and hearings specified in Section 554 and 556 of the APA[72] thus are not required in Section 315(b) cases. Moreover, we do not anticipate the need to hold formal adjudicatory hearings in the majority of complaints arising under Section 315(b). Petitioners' claim that our Section 315(b) procedures differ from other procedures specified in our rules is irrelevant.[73] The Commission has broad authority to establish individually tailored procedures to carry out its responsibilities under the Act, including the enforcement of Section 315.[74] In other contexts, we have crafted procedural requirements governing specific types of complaints which differ from our procedural rules governing pleadings generally or our rules governing formal hearings.[75]

27. Contrary to petitioners' claims,[76] the procedures set forth in the *Declaratory Ruling* fully protect the rights of parties and should facilitate timely and fair resolution of such complaints, thus advancing the interests of the parties and the public interest. These procedures are tailored to address the specific factual and legal issues that arise in Section 315(b) disputes. For example, at the heart of any Section 315(b) dispute is whether the station has charged the complaining candidate the "lowest unit charge" as prescribed by the statute. Accordingly, our procedures provide for limited discovery designed to enable the candidate to examine station records directly pertaining to this issue, while protecting broadcasters from potentially harmful public disclosure of proprietary information or the identity of their advertising customers. In this manner, our procedures are designed to protect the legitimate interests of both parties to the complaint. If actual experience indicates areas where our Section 315(b) procedures should be revised, we will revisit them.[77]

IV. CONCLUSION

28. We have reviewed petitioners' arguments and conclude that they do not support reconsideration of the *Declaratory Ruling*. We thus affirm our prior ruling in its entirety, including our holding that federal law preempts state causes of action dependent on any determination of the lowest unit charge or any other duty arising under Section 315(b) of the Communications Act.

V. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, that the petitions for reconsideration filed on January 15, 1992, by certain candidates for political office in Georgia and Alabama and their respective campaign committees ARE DENIED.

30. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i) and (j), 303(r), and 315(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 303(r), and 315(b) and (d); Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 556(e); and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the *Declaratory Ruling* in this proceeding IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Petitions for Reconsideration

1. Zell Miller, Zell Miller for Governor, Pierre Howard, Georgians For Howard '90, Johnny Isakson, Johnny Isakson For Governor, Andrew Young, Young Working For Georgia, Lauren McDonald, Lauren McDonald For Governor, Roy Barnes, Roy Barnes For Governor, Tim Ryles, Tim Ryles For Insurance Commissioner, Warren Evans, Warren Evans Election Committee, William L Dickinson, Second District Campaign Committee, William J. Cabaniss, Friends of Bill Cabaniss Committee, Ronnie Flippo, Flippo for Governor Committee, Spencer T. Bachus, III, Bachus for Attorney General Committee, John Teague, Jeremiah A. Denton, Denton for Senate Committee, James E. Folsom, Jr., Jim Folsom, Jr. for Lieutenant Governor Committee, Fob James, Fob James for Governor Committee, Kenneth D. Wallis, Alabamians for Ken Wallis Committee, George D. H. McMillan, Jr., The McMillan Committee, George Wallace, Jr., Wallace for Treasurer Committee, Charles A Graddick, Graddick for Governor Committee, William J. Baxley, Friends of Bill Baxley, Paul Hubbert, Richard Shelby, Don Siegelman, Jimmy Sullivan, candidates for public office in Georgia and Alabama and their respective campaign committees (January 15, 1992)

2. Sonny Hornsby, Friends of E.C. Sonny Hornsby, Mark Kennedy, Judge Mark Kennedy for Supreme Court and Friends of Judge Mark Kennedy (adopting, incorporating and joining the petition for reconsideration of Zell Miller, et al.) (January 15, 1992)

Oppositions

1. Capital Cities/ABC, Inc., Chris-Craft Industries, Inc., and the Times Mirror Company (March 5, 1992)

2. A. H. Belo Corporation, Booth American Company, Cosmos Broadcasting Corporation, Cox Enterprises, Inc., Evening Post Publishing Company and River City License Partnership (March 6, 1992)

3. American Family Broadcast Group, Inc., Tribune Broadcasting Company, Great American Television and Radio Company, Inc., Kelly Broadcasting Company, Kelly Television Company, McGraw-Hill Broadcasting Company, Inc., The New York Times Company, SCI Television, Inc., WTVT, Inc., Gillett Broadcasting of California, Inc., National Association of Broadcasters, Westinghouse Broadcasting Company, Inc., The Spartan Radiocasting Company, The Providence Journal Company, Post-Newsweek Stations, Inc., and Fox Television Stations Inc. (March 6, 1992)

Reply

1. Zell Miller, et al., candidates for public office in Georgia and Alabama and their respective campaign committees (March 20, 1992)

FOOTNOTES

[1] 6 FCC Rcd 7511 (1991).

[2] Section 315(b) provides that a broadcast station's charges for advertising time purchased by candidates for political office during certain specified periods before primary and general elections may not exceed "the lowest unit charge of the station for the same class and amount of time for the same period." At all other times, the charges to such candidates may not exceed "the charges made for comparable use of such station by other users." 47 U.S.C. § 315(b). Section 315(b) applies both to over-the-air broadcast stations and cable system operators. *See* 47 U.S.C. § 315(c). The terms "broadcast stations," "broadcasters," or "licensees," as used in this document, are thus meant to include cable operators as well.

[3] *See Codification of the Commission's Political Programming Policies*, MM Docket No. 91-168, 7 FCC Rcd 678 (1991), *Erratum*, 7 FCC Rcd 920 (M.M.B. 1992), *reconsidered in part*, 7 FCC Rcd 1616 (1992), *further reconsideration*, FCC 92-210 (adopted May 14, 1992).

[4] 6 FCC Rcd 5954 (1991), 56 Fed. Reg. 51895 (Oct. 16, 1991).

[5] A summary of the *Declaratory Ruling* was published in the *Federal Register* on January 14, 1992. 57 Fed. Reg. 1478 (1992).

[6] *Declaratory Ruling*, 6 FCC Rcd at 7511, para. 1.

[7] *Id.*

[8] *Id.*, 6 FCC Rcd at 7513, paras. 17-19.

[9] *Id.*, 6 FCC Rcd at 7513-14, paras. 21-25.

[10] 57 Fed. Reg. 6121 (Feb. 20, 1992).

[11] 47 C.F.R. § 1.429 (1991).

[12] A list of persons joining in the petitions for reconsideration and the oppositions is attached as an appendix. Further references herein to "petition" or "petitioners" refer to the petition filed by Zell Miller *et al.*, since the petition filed by Sonny Hornsby *et al.* offers no separate substantive arguments but rather adopts, incorporates and joins the Zell Miller pleading.

[13] *Declaratory Ruling*, 6 FCC Rcd at 7511-12, paras. 7-8.

[14] Petition at 2-5.

[15] 6 FCC Rcd at 7511-12, paras. 7-8 (citing, among other statutory provisions, Section 315(d) of the Act).

[16] 6 FCC Rcd at 7511, para. 7.

[17] *Declaratory Ruling*, 6 FCC Rcd at 7512, para. 8 n.17 (citing S. Rep. No. 96, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 1773, 1786). Petitioners assert that this passage from the Senate report is considered out of context and refers to the spending limitations contained in the legislation rather than Section 315(b). Petition at 9-10. The Commission's Chairman, however, was referring to enforcement of the legislation's *broadcast provisions*, of which the lowest unit charge requirement of current Section 315(b) was an integral part. There would have been no reason for the Commission's Chairman to testify about FECA's spending limitations, because the Commission has no jurisdiction over those provisions.

[18] *See Declaratory Ruling*, 6 FCC Rcd at 7512, para. 14 (quoting S. Rep. No. 96, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News at 1774).

[19] *See* 47 U.S.C. § 315(d) (directing the FCC to "make rules and regulations to carry this provision [Section 315] into effect."); *Declaratory Ruling*, 6 FCC Rcd at 7512, paras. 8, 11.

[20] *Kay v. FCC*, 443 F.2d 638, 643-44 (D.C. Cir. 1970).

[21] *See* Petition at 8-9.

[22] *See* Sutherland Stat. Const. § 22.34 (4th Ed.) (amendment should be construed together with unchanged provisions of original section); *id.* at § 22.35 (amendment should be construed as if part of original enactment).

[23] 47 U.S.C. § 315(b) (1952).

[24] 633 F.2d 393 (5th Cir. 1980).

[25] *See* Petition at 7-8.

[26] 6 FCC Rcd at 7512, para. 8 n.17.

[27] As we have pointed out, moreover, Section 315(b) restricted the charges broadcasters could assess for political advertisements long before FECA was adopted.

[28] 47 U.S.C. § 414.

[29] *See* Petition at 6-7.

[30] *Zell Miller for Governor v. Pacific & Southern Co., Inc.*, No. 1:91-CV-267-RLV, slip op. at 11-12 (N.D. Ga. June 4, 1991); *Declaratory Ruling*, 6 FCC Rcd at 7513, para. 20 & n.44.

[31] *Id.*, 6 FCC Rcd at 7513, para. 20 & n.45. *See Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658, 671 n.22 (1963); *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 707-8 n.6 (1st Cir. 1977).

[32] *Declaratory Ruling*, 6 FCC Rcd at 7513, para. 20 & n.43 (citing *Texas & Pacific Railroad Co. v. Abilene Cotton Oil Co.*, 204 U.S. 427 (1907); *Pennsylvania Railroad v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *In re Long Distance Telecommunications Litigation*, 831 F.2d. 627 (6th Cir. 1987); *Comtronics, Inc.*, 553 F.2d at 707-08 n.6 (1st Cir. 1977); *Blackburn v. Doubleday Broadcasting, Inc.*, 353 N.W.2d 550 (Minn. 1984)).

[33] In *Kalo Brick*, the Supreme Court held that a state statutory remedy and certain common law causes of action for damages against a railroad carrier were preempted despite a savings clause in the Interstate Commerce Act containing language identical to that contained in Section 414 of the Communications Act.

[34] *Declaratory Ruling*, 6 FCC RCd at 7513, para. 15.

[35] Petitioners' reliance on *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), and similar cases is misplaced. *See* Petition at 7 n.2. In *Nader*, the Supreme Court held that a common law action for fraudulent misrepresentation against an air carrier need not be stayed pending reference to the Civil Aeronautics Board for determination whether the practice is deceptive within the meaning of the Federal Aviation Act. Emphasizing that a violation of the relevant statutory provision was not coextensive with a breach of duty under the common law, the Court found no "irreconcilable conflict between the statutory scheme and the persistence of common law remedies." *Id.*, 426 U.S. at 299. Thus, in *Nader* and other cases cited by petitioners, the alleged breach of duties under state law were distinguishable from those created under federal law and involved different elements of proof. *See, e. g., Nepera Chemical, Inc. v. Sea - Land Service, Inc.*, 794 F.2d 688 (D.C. Cir. 1986); *Bruss Co. v. Allnet Communication Services,*

Inc., 606 F.Supp. 401 (N.D. Ill. 1985); *Kaplan v. ITT - US Transmission Systems Inc.*, 589 F.Supp. 729 (E.D. N.Y. 1984). In contrast, we held in the *Declaratory Ruling* that state causes of action are preempted to the extent they involve alleged breaches of duty under state law that are dependent on proof of a violation of some duty arising under Section 315(b). That is, unlike in *Nader*, we are dealing with causes of action for which no conceivable liability may attach under state law without the central finding of a Section 315(b) violation. Indeed, petitioners do not even attempt to demonstrate that the state causes of action they espouse are distinct from complaints of Section 315(b) violations. Petitioners acknowledge instead that their objective is to provide "a convenient [state] forum for candidates to seek redress for alleged violations of Section 315(b)." Petition at 16. Petitioners' objection to the *Declaratory Ruling* thus is based fundamentally on their view that "Congress did not intend to give the Commission exclusive jurisdiction over such [Section 315(b)] claims." Petition at 5. We accordingly conclude that *Nader* and similar cases are not controlling here.

[36] *Declaratory Ruling*, 6 FCC Rcd 7512, para. 12. We discussed this concern primarily in the context of our discussion in the *Declaratory Ruling* regarding the exercise of our independent authority to preempt in order to achieve the purpose of developing uniform standards for interpreting and enforcing Section 315(b). Furthermore, whatever the potential for inconsistent interpretations of Section 315(b), Congress centralized in the Commission implementation and enforcement authority with respect to the Communications Act generally and Section 315 specifically, and thus impliedly preempted state causes of action involving breaches of duties arising under Section 315(b).

[37] Petition at 10-15; Reply at 3.

[38] S. Rep. No. 96, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News at 1780.

[39] *See Codification of the Commission's Political Programming Policies*, 7 FCC Rcd at 687-98, paras. 50-119; 7 FCC Rcd at 701-2 (Appendix B) (text of new rule concerning the lowest unit charge requirement to be codified at 47 C.F.R. § 73.1942).

[40] We do not suggest, of course, that state courts are incapable of resolving such "complicated" questions. Our point is that uniformity and certainty in this area are such important considerations that the entire enforcement function has been centralized in this agency. State courts could resolve lowest unit charge questions in a manner that would be perfectly reasonable in the abstract but unacceptably inconsistent with the Commission's standards for enforcement of Section 315(b).

[41] Petitioners cite *Tafflin v. Levitt*, 493 U.S. 455 (1990), and *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), for the proposition that the availability of Supreme Court review of any erroneous state court decisions obviates the need for federal preemption. *See* Petition at 13. Those cases, however, involved questions of whether state courts had concurrent jurisdiction with federal courts, not, as here, whether state courts are preempted from acting in an area where Congress has given a single federal agency exclusive jurisdiction over an area of regulation. *See, e. g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940) (in adopting the Communications Act, Congress "formulated a unified and comprehensive regulatory system for the [broadcasting] industry" to be administered by the FCC).

[42] Final decisions of the Commission concerning Section 315(b), including this declaratory ruling, are of course subject to judicial review by the United States Court of Appeals and, ultimately, the United States Supreme Court. 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1).

[43] *See* Petition at 13-14 & n.7.

[44] *See* Section III.A.2., *infra*.

[45] The cases cited by petitioner involving state court construction of federal statutes do not involve situations where, as here, Congress has given exclusive jurisdiction to a federal regulatory agency, and thus are inapposite. *See* Petition at 14 n.7. Moreover, in those cases the courts found that the causes of action at issue were clearly based on state law and the alleged violation of federal law was "merely one of the props" utilized to support the state law claim. *Owens v. New York Central Railroad Company*, 267 F. Supp. 252, 255 (E.D. Ill. 1967) (cause of action grounded in negligence). *See, e. g., Moore v. Chesapeake & Ohio Railway Co.*, 193 U.S. 205 (1934) (relevant cause of action based on state statute which incorporated language from similar federal statute); *Moody v. McDaniel*, 190 F. Supp. 24 (N.D. Miss. 1960) (cause of action based on state wrongful death statute); *Tri-State Motor Transit Co. v. Maclif Industries*, 534 F. Supp. 283 (S.D. Tex. 1982) (court held that cause of action may be resolved wholly in terms of principles of state common law of contract). Here, in contrast, the lawsuits at issue derive fundamentally from Section 315(b)'s lowest unit charge requirement, not from existing state common or statutory law.

[46] *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956).

[47] Indeed, in recent state court litigation involving Section 315(b), the court, supported by certain of the petitioners in this proceeding, refused a request by the Commission to invoke the doctrine of primary jurisdiction and defer to the agency on the issue of liability. *See Dickinson v. Cosmos Broadcasting Co.*, No. CV-91-67-P (Ala. Cir. Ct. Sept. 23, 1991). The Commission suggested a primary jurisdiction referral in that case because it had not yet considered whether state actions were preempted.

[48] *Declaratory Ruling*, 6 FCC Rcd at 7513, para. 19.

[49] Petition at 15-16.

[50] *Id.; see also* Petition at 23-24.

[51] *See, e.g., Outlet Communications*, Inc., 5 FCC Rcd 2835 (M.M.B. 1990), *affirmed*, 7 FCC Rcd 632 (1992); *Alfa Broadcasting Corp.*, 55 RR 2d 599 (M.M.B.), *review denied*, 102 FCC 2d 18 (1984). *See also Chronicle Publishing Co.*, 6 FCC Rcd 7497, 7499 (1991) (directing licensee to advise Commission of actions taken to refund Section 315(b) overcharges); *South Arkansas Radio Company*, 5 FCC Rcd 4643, 4643 (M.M.B. 1990) (requiring rebates of Section 315(b) overcharges).

[52] *See* 47 U.S.C. § 315(d). *See also* Section 1 of the Act, 47 U.S.C. § 151.

[53] 47 U.S.C. § 154(i).

[54] The fact that Title III of the Act relating to broadcasters does not mirror the remedial procedures for common carriers specified in Title II, which include an express provision for damages in some circumstances, does not change our conclusion. *See* Petition at 5-6. In *New England Telephone*, the court held that, pursuant to Section 4(i), the Commission may require carriers to refund earnings in excess of a Commission-prescribed authorized rate-of-return even though refunds are not expressly authorized, and even though another part of Title II expressly permits an award of damages against carriers for other types of violations. Thus, the mere fact that one part of the Act expressly provides for damages does not justify an inference that the Commission's authority under Section 4(i) is not broad enough to permit the Commission to order refunds in other circumstances, especially where refunds are necessary in order to achieve compliance with the Act's express requirements. Petitioners' citation to TVA v. H ill, 437 U.S. 153, 188 (1978), is inapposite. Under the Endangered Species Act at issue in that case, Congress had acted to limit the reach of the statute in certain well-defined instances, and the court recognized such congressional exceptions to federal ju-

risdiction. In the Communications Act, in contrast, Congress has granted the Commission broad and exclusive power to implement and enforce the provisions of Section 315(b) without exceptions.

[55] Further, as we explained above in Section III.A.1.b, the prospect of differing remedies imposed by various state courts would frustrate the congressional goals of uniformity and certainty in the application and enforcement of Section 315(b) and might well impede, rather than foster, the dissemination of information regarding political campaigns favored by Congress. Moreover, we are not persuaded by petitioners' argument that our preemption decision unfairly requires candidates around the country to litigate their claims in Washington, D.C. before the Commission rather than in more convenient state courts. *See* Petition at 16; Reply at 5-6. We perceive no hardship in requiring candidates to file their complaints with the Commission in accordance with the procedures established in the *Declaratory Ruling*. We anticipate that most such claims can be adjudicated on the basis of a written record and would not require travel to Washington.

[56] *Declaratory Ruling*, 6 FCC Rcd at 7512-13, paras. 9-16.

[57] Petition at 16-20.

[58] The *Louisiana* case, of course, involved statutory language in which the Court held that Congress expressly had *denied* power to the Commission to regulate the activity in question. 486 U.S. at 374. It was in that context that the Court asserted that the agency "may not confer power upon itself." Neither Section 315 nor any other provision of the Act denies the Commission power over the lowest unit charge requirement. On the contrary, the Act establishes the Commission as the enforcer of that requirement.

[59] 6 FCC Rcd at 7512, para. 11.

[60] 486 U.S. at 64 (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984), and *de la Cuesta*, 458 U.S. at 152-54).

[61] Petitioners maintain that "whether a state cause of action is pre-empted by federal law is not determinative of whether judicial remedies to enforce possible federal causes of action should be foreclosed. Exclusive jurisdiction and pre-emption are two entirely different things." Petition at 18. However, we expressed the view in the *Declaratory Ruling* that Section 315(b) does not give rise to a private federal cause of action and that any federal lawsuit based directly upon allegations of violations of Section 315(b) therefore should be dismissed. 6 FCC Rcd at 7511, para. 5 n.8, and 7512, para. 8 n.17. Consistent with our expressed view, a federal district court on its own recently determined that it lacked subject matter jurisdiction over an action predicated on alleged violations of Section 315(b) and dismissed the case. *Pete Wilson v. A. H. Belo Corp.*, No. CIV S-91-1206 LKK (E.D. Cal. April 27, 1992).

[62] Petition at 19-20.

[63] *See* Section III.A.1.b., supra; *Declaratory Ruling*, 6 FCC Rcd at 7512, para. 12.

[64] *Declaratory Ruling*, 6 FCC Rcd at 7512, para. 14. *See Farmers Educational & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 534-35 (1959).

[65] 6 FCC Rcd at 7513, para. 21.

[66] *Declaratory Ruling*, 6 FCC Rcd at 7513-14, paras. 21-25.

[67] Petition at 22-23.

[68] 5 U.S.C §§ 551-559.

[69] Petitioners also suggest that the *Declaratory Ruling* creates uncertainty as to the applicable statute of limitations for Section 315(b) complaints and "can potentially be read to shorten the amount of time which would otherwise be applicable under state law." Petition at 22. As petitioners note, however, the Commission did "not specif[y] a specific statute of limitations." *Id.* Rather, we stated "[a]s a matter of general policy" that "complainants should file lowest unit charge complaints in a timely manner." *Declaratory Ruling*, 6 FCC Rcd at 7513, para. 22 n.46. We note that licensees are accountable for their performance throughout their five-year or seven-year license terms, 47 U.S.C. § 307, and are subject to forfeitures for up to three years following a violation of the Act, 47 U.S.C. § 503. However, licensees are required by our regulations to retain political file documents only for a period of two years. 47 C.F.R. § 73.1943(c) (formerly codified at 47 C.F.R. § 73.1940).

[70] Petition at 20-22.

[71] 5 U.S.C. § 554.

[72] *See* 5 U.S.C. §§ 554, 556.

[73] *See* Petition at 20-21. Petitioners refer to existing procedural rules governing pleadings generally and other rules addressing formal hearings before adminstrative law judges.

[74] *See 47 U.S.C. § 315(d); see also* 47 U.S.C. §§ 154(i), (j).

[75] *See, e.g.*, 47 C.F.R. §§ 1.720-1.734 (1991) (procedures governing formal complaints brought against common carriers under Section 208); 47 C.F.R. §§ 1.1401-1.1415 (1991) (procedures governing pole attachment complaints brought under Section 224).

[76] *See, e.g.*, Reply at 5-8.

[77] In any event, we note that the adequacy and lawfulness of our procedures governing complaints brought under Section 315(b) has no bearing on our preemption analysis set forth in Sections III.A, *supra*. Any infirmities in the Section 315(b) procedures would not justify alteration of our decision to preempt state causes of action involving breaches of duties arising under Section 315(b).

Separate Statement of Commissioner James H. Quello

In re: Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended.

I fully agree with the Commission's reaffirmation of the *Declaratory Ruling* and the denial of the petitions for reconsideration. I am writing separately only to clarify one issue regarding the procedures for filing complaints.

In the current *Order*, the Commission notes that "we reaffirm those procedures in their entirety." *Order on Reconsideration* at ¶ 24. Because I dissented from the procedural section of the Declaratory Ruling, I am somewhat less enthusiastic in my support. Thus, I agree with the current *Order* insofar as it dismisses petitions that would reduce due process safeguards — but I do not now endorse the procedures "in their entirety."

As I noted in my separate statement accompanying the *Declaratory Ruling*:

> [A]lthough the Ruling expresses concern with the administrative burden created by complaints, it establishes a new multi-stage procedure that includes a complaint, discovery, an amended complaint and several levels of Commission decisions including the possibility of hearings.
>
> I dissent from the hastily made decision to adopt procedures because we do not yet know whether the new guidelines will help or make matters worse. Will the new procedures allow candidates to make a prima facie case and obtain quick relief or will they delay matters? Will they encourage the filing of speculative complaints, thus requiring the application of settlement limits? Will the number of complaints diminish now that the Commission is clarifying the political rules or will the volume of complaints under the new procedures create an administrative nightmare? We simply do not know.

Declaratory Ruling, 6 FCC 7511, 7516-17 (1991) (Separate Statement of Commissioner James H. Quello, dissenting in part) (citation omitted).

Although such questions apparently did not trouble the Commission in this case, we have expressed similar concerns in the past:

> Each year the Commission receives a substantial number of petitions or complaints against broadcast licensees. Although we would not anticipate that every petitioner or complainant would request discovery, it seems clear to us that if a substantial number did so it would require an inordinate amount of time and effort to determine whether the requests would properly lie for the production of such records.

Citizens Communications Center, 61 F.C.C.2d 1112, 1126-27 (1976).

Such problems were avoided, it seems to me, under our previous approach for handling complaints. The U.S. Court of Appeals for the D.C. Circuit has noted that "the FCC generally has elected to resolve factual uncertainties by conducting its own inquiry, rather than by affording petitioners discovery." *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978) (*en banc*). "For several reasons," according to the court, "this usually will be the preferable course: the Commission's questions are likely to be more expert, the licensees' answers more uniform and comparable. In addition, licensee cooperation is likely to be fuller and more prompt." *Id.*

I have seen nothing in the record of this proceeding to dispute these points. Indeed, the Commission inexplicably found it unnecessary even to entertain comments on the procedural issue.

With respect to this issue, however, the current *Order* only dismisses petitions seeking to eliminate procedural safeguards. In that result, I can agree.

*U.S. Government Printing Office: 1992 — 312-024/60021